90-971

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

AVESTA AB AND AVESTA STAINLESS, INC.,

Petitioners,

v.

THE UNITED STATES, ALLEGHENY LUDLUM STEEL CORPORATION, ARMCO INC., JESSOP STEEL CORPORATION, J & L SPECIALTY PRODUCTS COMPANY, WASHINGTON STEEL CORPORATION, AND UNITED STEELWORKERS OF AMERICA, AFL/CIO-CLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States International Trade Commission's refusal to grant the petitioners' request to initiate a review of a 1973 finding of dumping on the basis of "changed circumstances" under Section 751(b)(1) of the Tariff Act of 1930, 19 U.S.C. § 1675(b)(1), enacted by the Trade Agreements Act of 1979 to implement the Anti-dumping Code of the General Agreement on Tariffs and Trade, is "not in accordance with law" under 19 U.S.C. § 1516a(b)(1)(A), because the Commission failed to articulate an appropriate standard to evaluate the request, prejudged the merits, and denied petitioners a statutory right to a hearing.

2. Whether the Commission's refusal to grant petitioners' request to initiate a review of the 1973 finding of dumping is "arbitrary, capricious, [or] an abuse of discretion . . ." under 19 U.S.C. § 1516a(b)(1)(A).

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties in the United States Court of Appeals for the Federal Circuit and in the United States Court of International Trade.[1]

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[1] The petitioner Avesta AB is the parent corporation, whose stock is listed on the Stockholm Stock Exchange. Its principal shareholders are: Nordstjernan AB; Axel Johnson HAB; AGA Group; Livförsäkrings AB Skandia; Wasa Livförsäkring Ömsesidigt; and EB-Stiftelsen SEB Pensionsstiftelse.

Avesta AB's non-wholly-owned subsidiaries are: Avesta Sandvik Tube AB; AST Rostfria VA-system AB; AST stainless aps, Denmark; Avesta Sandvik Tube BV, Netherlands; Fagersta Sandvik Rohr GmbH, Germany; Avesta Uddeholm Stainless Bar AB; Djäknehytterotarnas Skifteslag; AB Kallströmmen; Pershytte Grufvebolag (participations); Knaben Molybdaengruber A/S, Norway; Avesta SpA, Italy; Avesta Johnson Ges mbH, Austria.

Avesta AB has an interest in the following associate companies: Nickelintressenter i Stockholm AB; ANSAB AB; Avesta Kraft AB; Avesta Utvecklingscentrum AB; Bruksinvest AB; Fagersta Stainless AB; Torshälla Fastighets AB; and Visentkraft AB.

Avesta AB has an interest in the following other companies: Dala Tillväxt AB; Gävle Varv AB; Scandinavian Nickel Corporation KB; Tibnor AB; Crude Shipping KB; Elektra Shipping KB; and Radar Shipping KB.

The petitioner Avesta Stainless, Inc. is a wholly-owned subsidiary of Avesta AB.

Avesta Sandvik Tube AB, a partially-owned subsidiary of the petitioner Avesta AB, acquired the assets of respondent Armco Inc.'s pipe and tube division in Wildwood, Florida, in June 1990.

In the United States Court of International Trade, the United States was the only original defendant. The remaining respondents were defendant-intervenors. The parties were so described in the briefs in the court of appeals and are so described in the court of appeals' published decision. 914 F.2d 233. On the date of issuance of its original decision (App. A), the court of appeals also issued a notice changing the caption of the case to list all parties other than the petitioners as defendants-appellees (App. B).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
1. Nature Of The Case	2
2. The Statutory Framework	4
The GATT "Anti-dumping Code" Of The Tokyo Round	4
The Trade Agreements Act of 1979	5
3. The Petitioners' Request For A Review of The 1973 Dumping Finding	7
The 1973 Dumping Finding	7
The Petitioners' Request For A Review	8
4. Decision Of The United States International Trade Commission	9
5. Decisions Of The Courts Below	10
Court of International Trade	10
Court of Appeals for the Federal Circuit	10

Page

REASONS FOR GRANTING THE WRIT 11

I. THE FEDERAL CIRCUIT'S CONSTRUCTION OF SECTION 751(b)(1) IS CONTRARY TO ITS LEGISLATIVE HISTORY AND THE GATT ANTI-DUMPING CODE 12

A. The International Dumping Code Requires A Dumping Order To Be Terminated When The Circumstances It Was Intended To Remedy No Longer Exist 12

B. Congress Included A Low Threshhold For A Preliminary Review 14

II. THE DECISION OF THE FEDERAL CIRCUIT MISCONSTRUES THE EXPRESS LANGUAGE OF SECTION 751(b)(1) BY ALLOWING THE COMMISSION TO DENY A REQUEST FOR REVIEW ON AN ARBITRARY, *AD HOC* BASIS WITHOUT ANY ARTICULATED STANDARD OF LAW 16

A. The Standard Of Judicial Review 16

B. The Commission Did Not Provide A Statement Of Reasons Why The Petitioners Did Not Meet The Threshold Requirements For A Review Under Section 751(b)(1) 18

C. The Petitioners Satisfied The Statute's Requirements For The Commencement Of A Review 18

D. A 1984 Amendment To Section 751(b)(1) Supports The Petitioners' Construction Of The Act 21

Page

III. THE COMMISSION'S DENIAL OF THE REQUEST FOR REVIEW WAS ARBITRARY AND CAPRICIOUS AND PETITIONERS WERE DENIED MEANINGFUL JUDICIAL REVIEW 23

CONCLUSION 26

APPENDICES

A. Decision of the United States Court of Appeals for the Federal Circuit, filed September 14, 1990 ..... 1a

B. Notice of the United States Court of Appeals for the Federal Circuit revising Official Caption, filed September 14, 1990 11a

C. Opinion of the United States Court of International Trade, filed October 27, 1989 ..... 12a

D. Notice of Decision of International Trade Commission, dated June 26, 1987, 52 Fed. Reg. 24541 (July 1, 1987) 31a

E. Views of Commissioners Alfred Eckes, Seeley Lodwick, and David Rohr, International Trade Commission 34a

F. Views of Chairman Susan Liebeler and Vice Chairman Anne Brunsdale, International Trade Commission 40a

G. Notice of Finding of Dumping, filed June 7, 1973, 38 Fed. Reg. 15079 (June 8, 1973) 41a

Page

H. Determination of Injury in Investigation No. AA1921-114, *Stainless Steel Plate From Sweden*, United States Tariff Commission, TC Publication 573 (May 1973) 43a

I. Statutes Involved 49a

TABLE OF AUTHORITIES

Cases

Avesta v. *United States*, 12 CIT ____, 689 F. Supp. 1173 (1988) 8

BATF v. *FLRA*, 464 U.S. 89 (1983) 18, 23

Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971) 17, 21

Department of Treasury, IRS v. *FLRA*, __U.S.__, 110 S.Ct. 1623 (1990) 18

Dunlop v. *Bachowski*, 421 U.S. 560 (1975) 17, 18, 24

Durousseau v. *United States*, 10 U.S. (6 Cranch) 307 (1810) 12

Heckler v. *Chaney*, 470 U.S. 821 (1985) 17

ICC v. *Brotherhood of Locomotive Engineers*, 482 U.S. 278 (1987) 20

Matsushita Elec. Indus. Co., Ltd. v. *United States*, 750 F.2d 927 (Fed. Cir. 1984) 20

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 582 (1986) 2

Motor Vehicle Mfrs. Ass'n v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983) 17, 23

Murray v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 12

NLRB v. *Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters*, 429 U.S. 507 (1977) 17

Suwanee Steamship Co. v. *United States*, 435 F. Supp. 389 (Cust. Ct. 1977) 15

Weinberger v. *Rossi*, 456 U.S. 25 (1982) 12

Statutes:

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*:

5 U.S.C. §706(2)(A) 20

5 U.S.C. § 706(2)(E) 20

Antidumping Act of 1921, 19 U.S.C. § 160 *et seq.* (repealed 1979) 6, 7

Tariff Act of 1930, 19 U.S.C. §§ 1202 *et seq.*:

19 U.S.C. §§ 1330-1332 17

19 U.S.C. § 1516(a)(1) 11

19 U.S.C. §1516a(b)(1) 19, 20, 21, 23

19 U.S.C. § 1673 6

19 U.S.C. § 1673e(a) 6, 22

19 U.S.C. § 1675(b)(1) ..... *passim*

19 U.S.C. § 1675(c) 7

19 U.S.C. § 1675(d) 7

	Page
Trade Act of 1974, 19 U.S.C. §§ 2101 *et seq.*:	
19 U.S.C. § 2112(e)	5
Trade Agreements Act of 1979, 19 U.S.C. §§ 2501 *et seq.*:	
19 U.S.C. § 2503(a)	5
19 U.S.C. § 2503(b)	5
19 U.S.C. § 2503(c)(6)	6
19 U.S.C. § 2504	12
Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 611(a)(2)(B)(iii), 98 Stat. 3031 (amending 19 U.S.C. §1675(b)(1))	21
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1295(a)(5)	11
28 U.S.C. § 1581(c)	11
Interstate Commerce Act, 49 U.S.C. § 10327(g)	20
Miscellaneous Authorities:	
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650	*passim*
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. 6431, 651 U.N.T.S. 320 (superseded 1979)	4

Page

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R. Bork, The Antitrust Paradox (1978). 2

19 C.F.R. § 207.45(a) 21

Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263 (1981) 2

General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 4

H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. (1984) 16

J. Jackson, The World Trading System: Law and Policy of International Economic Relations (1989). 15

Jackson, *United States Law and Implementation of the Tokyo Round*, in J. Jackson, J.-V. Louis & M. Matsushita, Implementing the Tokyo Round: National Constitutions and International Economic Rules (1984) 15

Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 Mich. L. Rev. 1570 (1984) 11, 18

Note, 73 Va. L. Rev. 1459 (1987) 2

Page

T. SCHOENBAUM, ANTIDUMPING AND COUNTERVAILING DUTIES AND THE GATT: AN EVALUATION AND PROPOSAL FOR A UNIFIED REMEDY FOR UNFAIR INTERNATIONAL TRADE (Dean Rusk Center for Int'l & Comp. Law 1987) 13, 14, 19

S. Rep. No. 96-249, 96th Cong., 1st Sess. (1979) . 5, 15

Statement of Administrative Action, H.R. Doc. No. 96-153, Part II, 96th Cong., 1st Sess. (1979) 14

E. VERMULST, ANTIDUMPING LAW IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES: A COMPARATIVE ANALYSIS (1987) 18

Victor, *Antidumping and Antitrust: Can The Inconsistencies Be Resolved?*, 15 N.Y.U. J. Intl. L. & Pol. 339 (1983) 2

J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1923) 2

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PETITION FOR A WRIT OF CERTIORARI

Avesta AB, a Swedish corporation which produces stainless steel plate in Sweden, and Avesta Stainless, Inc., a United States corporation wholly-owned by Avesta AB, which imports stainless steel plate into the United States, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit ("the Federal Circuit") in this case.

OPINIONS BELOW

The decision of the Federal Circuit (App. A, *infra*, 1a-10a) is reported at 914 F.2d 233. The opinion of the United States Court of International Trade ("the CIT") (App. C, *infra*, 12a-30a) is reported at 724 F. Supp. 974. The notice of decision of the United States International Trade Commission ("the Commission") (App. D, *infra*, 31a-33a) is reported at 52 Fed. Reg. 24531. The separate views of the commissioners (App. E and F, *infra*, 34a-40a) are unreported.

JURISDICTION

The judgment and decision of the Federal Circuit (App. A, *infra*, 1a) were entered on September 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes are set forth in App. I, *infra*, 49a.

STATEMENT OF THE CASE

1. Nature Of The Case.

The issue raised by this case is of great importance to America's international trade. Since the conclusion of the Tokyo Round of multilateral tariff and trade negotiations ("the Tokyo Round") in 1979, there has been an explosive growth in the number of anti-dumping orders issued by the United States against imports from virtually every nation.[2] The broad issue is whether these orders

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[2] Dumping is defined as price discrimination between international markets. *See* J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1923). It has been observed that "dumping law has consistently been interpreted to protect competitors rather than competition, a goal directly at odds with fundamental antitrust policy." Victor, *Antidumping and Antitrust: Can The Inconsistencies Be Resolved?*, 15 N.Y.U.J. Intl. L. & Pol. 339, 350 (1983) (footnote omitted); *accord*, Barcelo, *Antidumping Laws As Barriers to Trade – The United States and the International Antidumping Code*, 57 Cornell L. Rev. 491, 544 (1972). This view was recently reiterated in a note suggesting that "an ambiguous statutory scheme and an unpredictable pattern of enforcement combine to favor domestic producers at the expense of domestic consumers and transnational free trade." Note, 73 Va. L. Rev. 1459, 1499 (1987) (footnote omitted). *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 582 (1986). *See also* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 268 (1981); R. BORK, THE ANTITRUST PARADOX 144-145, 382-401 (1978).

are to remain forever in effect or must the United States comply with its commitment under an international agreement and terminate such orders whenever they are no longer necessary.

At the conclusion of the Tokyo Round negotiations in 1979, the United States signed an international Anti-dumping Code which provides, in part, that:

> An anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury.

To give domestic effect to this international obligation, Congress enacted Section 751(b)(1) of the Tariff Act of 1930, 19 U.S.C. §1675(b)(1) ("Section 751(b)(1)"), which vests the United States International Trade Commission with the authority to review existing antidumping and countervailing duty orders and to revoke or modify them on the grounds that circumstances have changed and the order is no longer warranted. During the past ten years, the Commission has virtually ignored the clear congressional intent.

When the Tokyo Round ended in 1979, the United States had 160 antidumping and countervailing duty orders in effect; by the summer of 1990, there were approximately 270 such orders in effect involving thousands of companies. Since 1980, the Commission has modified or terminated only six such orders and none in the past three years.

Here, based on market conditions which existed in the early 1970's, a "finding of dumping" was issued in 1973 against imports of certain stainless steel plate from Sweden. Fourteen years later, in 1987, the petitioners requested the Commission to review the circumstances which existed in the early 1970's and, thereafter, to revoke or modify the "finding of dumping" on the ground that there is no longer any need for its existence. The Commission, by 3-2 vote, refused to even conduct the requested review. This refusal was sustained by the United States Court of International Trade, and that decision was affirmed by the United States Court of Appeals for the Federal Circuit despite its observation that "the critical language in section 751(b) contains less than exacting standards of decision."

2. The Statutory Framework.

The 1979 GATT "Anti-dumping Code" Of The Tokyo Round.

Article VI of the General Agreement on Tariffs and Trade generally provides that "dumping . . . is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party . . . ." Art. VI, ¶ 1, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 ("the GATT"). However, antidumping duties are prohibited unless a contracting party "determines that the effect of the dumping . . . is such as to cause or threaten material injury to an established domestic industry . . . ." GATT, Art. VI, ¶ 6(a).

On April 12, 1979, the Tokyo Round negotiators concluded an Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, U.S.T. 4919, 4924, T.I.A.S. No. 9650.[3] This Anti-dumping Code ("the Code") provides, in part, that:

> anti-dumping duties may be applied against dumping only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry . . . .

Id., Preamble, 31 U.S.T. 4924.

Additionally, it was agreed that all signatory nations should:

> provide for equitable and open procedures as the basis for a full examination of dumping cases . . . and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation . . . .

Ibid.

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[3] The GATT previously adopted an Anti-dumping Code in 1967, to which the United States agreed. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. 6431, 651 U.N.T.S. 320 (superseded 1979). Congress declined to implement that Code.

Importantly, the Code expressly limits the duration of anti-dumping duties and requires a mechanism for review of outstanding orders:

> 1. An anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury.
>
> 2. The investigating authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review.

Code, Art. 9, 31 U.S.T. 4933.

Equally important, the Code provides that any determination of injury "shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products." Code, Art. 3, ¶ 1, 31 U.S.T. 4926. The investigation must "include an evaluation of all relevant economic factors and indices having a bearing on the state of the [domestic] industry . . . ." Code, Art. 3, ¶ 3, 31 U.S.T. 4926.

Detailed provisions are included concerning the right to present evidence and to insure that "all parties shall have a full opportunity for the defence of their interests." Code, Art. 6, ¶ 7, 31 U.S.T. 4929-4930.

The Trade Agreements Act of 1979.

The Trade Agreements Act of 1979 ("the Trade Agreements Act") approved and implemented agreements reached during the Tokyo Round. Pub. L. No. 96-39, §§ 2(a) and (b), 93 Stat. 144, 147, 19 U.S.C. §§ 2503(a) and (b).* The Act expressly approved and implemented "The Agreement on Implementation of Article VI

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* Congress approved and implemented the agreements reached in the Tokyo Round under the President's authority, pursuant to the Trade Act of 1974. 19 U.S.C. § 2112(e). S. Rep. No. 96-249, 96th Cong., 1st Sess. 4-5 (1979).

of the General Agreement on Tariffs and Trade (relating to antidumping measures)." 19 U.S.C. § 2503(c)(6).

The Trade Agreements Act repealed the Antidumping Act of 1921 and established a new statutory scheme for antidumping duties and orders in Title VII of the Tariff Act of 1930 ("the Tariff Act"). Pub. L. No. 96-39, § 101, 93 Stat. 150 *et seq.*, adding Section 701 *et seq.*, 19 U.S.C. § 1671 *et seq.*[5] Outstanding findings of dumping issued under the repealed Antidumping Act of 1921 remain effective under the new provisions and are subject to review under Section 751(b)(1). Pub. L. No. 96-39, § 106(a), 93 Stat. 193.[6]

"Antidumping duties" are assessed on imported merchandise in addition to any ordinary duties under the Tariff Act. They are imposed only after the Department of Commerce has determined that merchandise is being sold in the United States at less than fair value and the Commission has determined that "an industry in the United States . . . is materially injured, or . . . is threatened with material injury . . . ." 19 U.S.C. § 1673.

If both determinations are affirmative, the ITA must issue a dumping order which ultimately results in the United States Customs Service assessing "dumping duties." 19 U.S.C. §§ 1673 and 1673e. Dumping duties are intended to equal the amount by which the "foreign market value exceeds the United States price for the merchandise." 19 U.S.C. § 1673.

Section 751(b)(1) of the Tariff Act provides that:

> [w]henever the . . . Commission receives . . . a request for the review of . . . an affirmative [material injury] determination . . . which shows changed circumstances sufficient to warrant a review of such

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[5] The new Title VII of the Tariff Act of 1930 also contains new provisions for imposition of countervailing duties, which are not at issue in this case.

[6] A final affirmative determination under the Antidumping Act of 1921 was referred to as a "finding" of dumping. 19 U.S.C. § 160(a) (repealed). Such a determination is called an "antidumping duty order" under the new provisions in the Tariff Act of 1930, 19 U.S.C. § 1673e(a). The terms are used interchangeably in this petition.

> determination, it shall conduct such a review after publishing notice of the review in the Federal Register.

19 U.S.C. § 1675(b)(1). If review is initiated, the Commission must conduct an investigation. 19 U.S.C. § 1675(d). At the conclusion of the investigation, an antidumping duty order may be revoked in whole or in part. 19 U.S.C. § 1675(c).

Commission decisions "not to review . . . a determination" under Section 751(b)(1) may be challenged in the United States Court of International Trade which has exclusive jurisdiction. 28 U.S.C. § 1581(c). The Federal Circuit has exclusive jurisdiction of an appeal from the CIT. 28 U.S.C. § 1295(a)(5).

3. The Petitioners' Request For A Review Of The 1973 Dumping Finding.

The 1973 Dumping Finding.

On June 5, 1973, the Secretary of the Treasury issued a finding of dumping (App. G, 41a) as to certain stainless steel plate from Sweden ("the product") under the Antidumping Act of 1921, 19 U.S.C. § 160, *et seq.* (repealed). This was based on the Secretary's prior determination of sales at less than fair value and the determination of the United States Tariff Commission ("the Tariff Commission")[7] "that an industry in the United States is being injured by reason of the importation of stainless-steel plate from Sweden being sold at less than fair value" (App. H, 44a).[8]

The Tariff Commission reviewed the United States market as it existed in the early 1970's, and concluded that, during that period, the Swedish product was sold below the prices of domestic products (App. H, 45a). The Commission also concluded that the domestic industry was suffering "a severe profit squeeze . . . caused – at least in part – by their inability to raise prices . . ." (App. H, 46a).

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[7] The United States Tariff Commission was the predecessor of the United States International Trade Commission.

[8] The Tariff Commission determined that the injured domestic industry "consists of the facilities of domestic producers engaged in the production of stainless-steel plate." (App. H, 45a n.1).

The Commission further determined that, also in the early 1970's, Swedish producers had excess production capacity to expand exports to the United States (App. H, 46a). It determined that Swedish exports to Western Europe had increased in 1968-1971, but had declined in 1971 when exports to the United States began to increase (App. H, 47a). The Commission found that Swedish imports accounted for two percent of apparent United States consumption in 1970, five percent in 1971, and 12 percent in 1972 (*ibid.*). Finally, the Commission found a decline in domestic producers' profitability and return on investment during the early 1970's (App. H, 47a-48a).

The Petitioners' Request For A Review.

In 1987, petitioners filed a request with the Commission to initiate a review of the 1973 finding of dumping under Section 751(b)(1).[9] The request alleged that the factual bases for the 1973 finding no longer existed and that, in any event, no domestic industry was suffering injury from any importations of the Swedish stainless steel plate ("the product" or "plate").

Petitioners alleged that six changed circumstances warranted revocation of the 1973 finding. First, in 1976, Avesta acquired a U.S. steel mill in New Castle, Indiana, and now produces most of its product for the U.S. market in its Indiana mill. As a result there has been a significant reduction in the quantity of Swedish imports and virtual elimination of imports directly competitive with most domestic production.

Second, the petitioners asserted that Swedish imports were at *de minimis* levels, down seventy percent from 1973 to 1974. Further, they claimed that, as a result of Avesta's 1976 acquisition of the Indiana mill, its imports declined 60 percent below the levels of 1974 to 1975 and had remained at less than one percent of apparent U.S. consumption after 1976, with the average annual import penetration rate at less than one-half of

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[9] Petitioners filed a request for review of the 1973 dumping finding with the Commission in 1985. That prior request was also denied by the Commission and the denial was upheld by the CIT. *Avesta v. United States*, 12 CIT ____, 689 F. Supp. 1173 (1988).

one percent. (Petitioners also claimed that certain types of steel plate should not be included in the import statistics.)

Third, petitioners contended that, unlike the circumstances which existed in 1973, Avesta had dramatically shifted its exports from Sweden to Western Europe and away from the United States.

Fourth, the petitioners asserted that the Swedish industry has shrunk considerably since 1972 and has significantly reduced production capacity.

Fifth, the domestic industry is well protected from import competition by Voluntary Restraint Agreements ("VRAs") made in the 1980's between the United States and most major steel exporting nations. Domestic shipments increased by twenty percent from 1982 to 1986.

Sixth, petitioners were at a severe competitive disadvantage relative to importers from so-called VRA countries who were exempted from the strictures of the antidumping and countervailing duty laws.

Petitioners asserted two separate grounds for modification of the 1973 finding to exclude certain products. First, they claimed that its "KBR Plate" was a unique product available in widths greater than 60 inches and had been imported only once in 1986 for one customer for a special application. Second, they claimed that two of their patented grades of plate had unique alloys and did not compete with any domestic product (*see* App. A, 4a, n.2).

Five domestic producers and a domestic labor union opposed petitioners' request for a review and disputed many of petitioners' factual allegations. The Commission did not permit the submission of any "rebuttal" or responsive information.

4. Decision Of The United States International Trade Commission.

By a 3-2 vote, the Commission denied petitioners' request to initiate review of the 1973 dumping finding (Apps. D, 31a, and E, 34a). The Commission did not conduct a full investigation, did not investigate the conflicting factual allegations, and did not afford petitioners a hearing (as would have been required had an investigation been initiated).

The majority's decision applied no standard in denying the request. The majority simply stated that "the petition did not show changed circumstances sufficient to warrant institution of a review investigation" (App. E, 39a).

5. Decisions Of The Courts Below.

Court of International Trade.

Petitioners filed an action in the United States Court of International Trade seeking review of the Commission decision not to initiate a review of the 1973 dumping finding. The court reviewed the Commission's decision and concluded that it was neither arbitrary and capricious nor contrary to law (App. C, 12a, 30a).

Court of Appeals for the Federal Circuit.

On petitioners' appeal, the Federal Circuit affirmed the judgment of the CIT even though "[t]he court agree[d] . . . that the critical language in section 751(b) contains less than exacting standards of decision" (App. A, 6a).

The court of appeals concluded that it was not required to identify the legal standard which the Commission was required to apply. The court also concluded that the Commission was not required to apply and need not articulate any particular standard (App. A, 6a and 9a). It held that the Commission may use its discretion on a "case-by-case basis" and concluded that "section 751(b) left untouched the *ad hoc* nature of ITC decisions to institute review" (App. A, 7a).[10]

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[10] In upholding the Commission's *ad hoc* review, the court relied in part upon a 1974 Senate report involving a proposal to codify the Commission's regulatory procedure, which was not enacted (App. A, 6a-7a). The court apparently concluded, incorrectly, that in the Trade Agreements Act of 1979, Congress was merely adopting the Commission's prior practice, rather than implementing the United States' international agreement to the GATT Anti-dumping Code (App. A, 7a).

REASONS FOR GRANTING THE WRIT

The issue decided by the Federal Circuit raises a legal question of major importance to the international trade of the United States. The Federal Circuit held that the Commission, admittedly without articulating any legal standard, may deny a request to initiate a "changed circumstances" review under Section 751(b)(1) of the Tariff Act of 1930 to determine whether a 1973 dumping finding on imported stainless steel plate from Sweden should be modified or revoked.[11] The decision disregards the international agreement of the United States in the GATT Anti-dumping Code that antidumping orders are to "remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury," as implemented by the Trade Agreements Act of 1979.

Review by this Court is warranted because the issue cannot be developed further in other lower courts, since the CIT and the Federal Circuit have exclusive jurisdiction to review determinations of the International Trade Commission. 19 U.S.C. § 1516a(a)(1); 28 U.S.C. §§ 1581(c) and 1295(a)(5).

As a matter of law, the Federal Circuit's construction of Section 751(b)(1) disregards the statutory framework enacted by

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[11] There has been an explosive growth of antidumping and countervailing duty orders in effect in the United States. In 1979, there were approximately 160 antidumping and countervailing duty orders in effect. By 1990, the number of outstanding orders had increased to approximately 270. These statistics are based on a review of published notices in the Federal Register. They do *not include* approximately 40 orders against steel products which were revoked in 1985 and 1986 under Voluntary Restraint Agreements for steel.

The cost of international trade law proceedings in the United States for the government and the businesses involved is enormous. Professor John H. Jackson estimated the total annual cost of dumping proceedings in 1983 alone to be more than $47 billion. Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 Mich. L. Rev. 1570, 1587 (1984). He estimated the total annual cost of *all* United States import regulations at $237 billion, with the overwhelming part being borne by the private parties involved. The government's costs are extremely modest by comparison. *Ibid.* This cost does not include the cost to the economy resulting from the reduction in competition caused by the continued existence of obsolete antidumping orders.

Congress, ignores the express legislative history of this section, and disregards the international agreement of the United States in the GATT Anti-dumping Code that antidumping orders are to "remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury." Code, Art. 9, 31 U.S.T. 4933. The Federal Circuit's decision wrongly establishes the principle that the Commission need not articulate or apply a standard of review in determining whether a party has demonstrated "changed circumstances sufficient to warrant a review" under Section 751(b)(1). The court's decision allows the Commission to function on an arbitrary, *ad hoc* basis.

I

THE FEDERAL CIRCUIT'S CONSTRUCTION OF SECTION 751(b)(1) IS CONTRARY TO ITS LEGISLATIVE HISTORY AND THE GATT ANTI-DUMPING CODE.

A. The International Dumping Code Requires A Dumping Order To Be Terminated When The Circumstances It Was Intended To Remedy No Longer Exist.

Acts of Congress must be construed consistently with any international agreements which the acts were intended to implement. *See Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982).[12] Here, the statute enacted by Congress is fully consistent with the United States' international commitment; the question is whether the Commission has properly determined its obligation under the statute.[13]

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[12] The Commission and the courts below failed to follow this long-standing principle in their construction of Section 751(b)(1). As stated by the Court:

> The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.

Durousseau v. *United States*, 10 U.S. (6 Cranch) 307, 314 (1810) (Marshall, Ch. J.). In a slightly different context, Chief Justice Marshall observed that "an act of Congress ought never to be construed to violate the law of nations if any other construction remains . . ." *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

[13] In the event of irreconcilable conflict between the statute and the international agreement, Congress provided in the Trade Agreements Act that the statute must prevail. 19 U.S.C. § 2504. No such conflict is present here.

The rarity of the Commission's grant of full review under Section 751(b)(1) demonstrates that the Commission has failed to implement the two-fold congressional purpose of providing "greater procedural safeguards" and affording a party subject to an antidumping order with an opportunity for meaningful review. The effect negates the relevant provisions of the GATT Anti-dumping Code, which Congress expressly implemented in Section 751(b)(1).[14]

Section 751(b)(1) must be construed in light of the purposes and terms of the Anti-dumping Code. The United States agreed to this Code and thereby undertook "to provide for equitable and open procedures as the basis for a full examination of dumping cases . . . and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation . . . ." Anti-dumping Code, Preamble, *supra*, 31 U.S.T. 4924. Pursuant to its obligations under the Code, the United States is required to provide procedures which will insure that its antidumping orders "shall remain in force only as long as, and to the extent necessary to counteract dumping *which is causing injury*." Code, Art. 9, ¶ 1, 31 U.S.T. 4933 (emphasis added). The Anti-dumping Code requires the appropriate national authority to "review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review." *Ibid.* It is this particular provision of the Code which new Section 751(b)(1) of the Tariff Act was enacted to implement. By refusing to even commence reviews of existing determinations, the Commission has emasculated this international obligation of the United States.[15]

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[14] As has been observed, "the antidumping . . . laws have been expanded and applied to such a degree that in certain respects they are inconsistent with international standards under the GATT . . . Antidumping Code . . . . It is evident that, at a minimum, the GATT requirements should be adhered to in the administration of these laws." T. SCHOENBAUM, ANTIDUMPING AND COUNTERVAILING DUTIES AND THE GATT: AN EVALUATION AND PROPOSAL FOR A UNIFIED REMEDY FOR UNFAIR INTERNATIONAL TRADE 3 (Dean Rusk Center for Int'l & Comp. Law 1987).

[15] Once a company becomes subject to an antidumping order, its burden appears likely to never end, despite the provision for review in Section 751(b)(1) and the obligation under the Anti-dumping Code.

(Footnote continued)

B. Congress Included A Low Threshold For A Preliminary Review.

The legislative history and overall purpose of the Act support the petitioners' view that Congress intended that only a low threshold showing would be sufficient to obtain a review under Section 751(b)(1), consistent with the United States' agreement to the GATT Anti-dumping Code. The Federal Circuit's and the Commission's construction of Section 751(b)(1) is contrary to the Trade Agreements Act of 1979. The legislative history makes it clear that one of the purposes of that Act was to implement the Anti-dumping Code of the GATT which, again, provides that "[a]n anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury." Anti-dumping Code, Art. 9, ¶ 1, 31 U.S.T. 4933.

The Statement of Administrative Action ("the Statement") which the Executive Branch submitted to Congress explained the agreements reached in the Tokyo Round and proposed the Trade Agreements Act of 1979 to implement them. H.R. Doc. No. 96-153, Part II, 96th Cong., 1st Sess. 392 (1979). The Statement recognized that the agreements of the Tokyo Round were not self-implementing, and stated that the 1979 Act "will permit the United States to carry out fully its obligations under the agreements." *Ibid.* With regard to the new anti-dumping provisions, the Statement explained that they are intended to ensure conformity of domestic legislation with the revised Antidumping Code negotiated in the [Tokyo Round]." *Id.* at 393.

> The ITC has authority to review the injury determination. These reviews are often as burdensome for the parties as the original investigation. . . . These reviews and restrictions . . ensure . . that foreign exporters will be engaged for a period of years with the ITA and the ITC in an almost never-ending proceeding and investigation. This also seems to violate the GATT Code requirements to proceed expeditiously in such cases and to discontinue an order of investigation as soon as possible.

SCHOENBAUM, ANTIDUMPING AND COUNTERVAILING DUTIES AND THE GATT, *supra* at 22 (footnotes omitted).

The Senate Report also acknowledges that "[t]his bill is drafted with the intent to permit U.S. practice to be consistent with the obligations of the agreement ...." S. Rep. No. 96-249, *supra* at 6.[16] It explains that the Antidumping Act of 1921 would be repealed and replaced "with a comprehensive statute built upon the 1921 Act and consistent with the [Tokyo Round] Antidumping Code." S. Rep. No. 96-249, *supra* at 15-16 and 61. It states that dumping determinations would be subject to review on receipt of a request "which shows changed circumstances sufficient to warrant a review . . ., and stated that "[a]ll reviews . . . must include a hearing." *Id.* at 18. The Report reiterated that "upon the request of any interested party, [the Commission] would hold a hearing to provide an opportunity for the presentation of views with respect to the issue under review." *Id.* at 80; Statement, *supra* at 429.

The Senate Report also explains that the standard for judicial review of negative Commission review determinations is "whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .." S. Rep. No. 96-249, *supra* at 248.[17] The Report recognizes that the new judicial review provision "would greatly expand the right of interested parties to appear and be heard in litigation involving antidumping . . . duties." *Id.* at 250. It also acknowledges that its increase in the number of determinations subject to judicial review "is intended to provide greater procedural safeguards than exist under current law and to expedite the obtaining of judicial relief." *Ibid.* Finally, the Report explains that "traditional administrative law principles are to be applied in reviewing antidumping . . . duty decisions . . .." *Id.* at 252.

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[16] For this reason, "the agreements are most certainly part of the legislative history of the statute . . ." J. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 75-76 (1989); *see also* Jackson, *United States Law and Implementation of the Tokyo Round Negotiation*, in J. JACKSON, J.-V. LOUIS & M. MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 139, 167 (1984).

[17] The Report explained that this was the same standard previously applied by the United States Customs Court (now the United States Court of International Trade) in *Suwanee Steamship Co. v. United States*, 435 F. Supp. 389 (Cust. Ct. 1977).

Congress's 1984 amendment to Section 751(b)(1) added the requirement that the party seeking revocation bear "the burden of persuasion with respect to whether there are changed circumstances warranting revocation . . . ." 19 U.S.C. § 1675(b)(1) (as amended in 1984). The Conference Report explains that this requirement ensures that "*at the end of the investigation*, the ITC must be convinced that revocation of the order is appropriate." H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 182-183 (1984) (emphasis added). Since Congress took pains to establish this "burden" of persuasion at the end of the full-scale investigation, it must have intended a lower level of persuasion to apply at the initial stage. To impose a "burden" of persuading the Commission at the outset that there are changed circumstances warranting revocation would make the subsequent investigation superfluous.

Despite the unmistakable intention of Congress to impose a low threshold showing to initiate a review, the Federal Circuit has given the Commission unfettered discretion to deny a request to initiate a review of a dumping finding or order. The result, as here, is a consistent failure by the Commission to even consider the revocation of obsolete dumping orders. Here, the Commission, by a 3-2 vote, implausibly concluded that conditions in the American market for stainless steel plate in 1987 had not changed since the early 1970's.

II

THE DECISION OF THE FEDERAL CIRCUIT MISCONSTRUES THE EXPRESS LANGUAGE OF SECTION 751(b)(1) BY ALLOWING THE COMMISSION TO DENY A REQUEST FOR REVIEW ON AN ARBITRARY, *AD HOC* BASIS WITHOUT ANY ARTICULATED STANDARD OF LAW.

A. The Standard Of Judicial Review.

Congress has directed the courts to apply a familiar standard in reviewing a Commission determination not to grant a review of an outstanding dumping order on the basis of "changed circumstances" under Section 751(b)(1) of the Tariff Act. Specifically, the refusal to grant a review may be held unlawful if the

refusal is found "to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . ." 19 U.S.C. § 1516a(b)(1)(A).[18] This standard is identical to one of the standards of review provided in the Administrative Procedure Act, 5 U.S.C. §706(2)(A).

Although the standard is a familiar one, it arises in a context which this Court has not previously addressed.[19] The differences here are that, first, a factual administrative record was not created at the preliminary stage of review and, second, the petitioners bear a lighter burden to obtain a review than the "burden of persuasion" they carry after a review is initiated.

Whether the Commission properly construed the statute's requirements for obtaining a review of an antidumping order is a question of law to be decided by the Court. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 411, 415-416 (1971); *accord*, *Motor Vehicle Mfrs. Assn* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983); *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

An agency determination is reversible when the "agency has made an error of law." *NLRB* v. *Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters*, 429 U.S. 507, 522 n.9 (1977). This Court stated that:

> [T]he "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress . . . ." Accordingly, . . . reviewing courts . . . must not "rubber-stamp . . . administrative decisions that they

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[18] *See Dunlop* v. *Bachowski*, 421 U.S. 560 (1975) (decision of Secretary of Labor not to bring suit to challenge union election reviewable); *cf. Heckler* v. *Chaney*, 470 U.S. 821 (1985).

[19] The Commission is an independent agency whose task is essentially fact-finding and adjudication. *See* 19 U.S.C. §§ 1330-1332. It determines conflicting factual claims as to whether a domestic industry is or may suffer harm as a result of the dumping of imported merchandise. It does not engage in substantive rulemaking and does not have any affirmative law enforcement responsibilities, though it may initiate certain proceedings *sua sponte*.

> deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

BATF v. *FLRA*, 464 U.S. 89, 97 (1983) (citations omitted)(FLRA exceeded authority by ordering agency to pay a union representative travel expenses and per diem as part of "official time"). *Accord*, *Department of Treasury, IRS* v. *FLRA*, __ U.S. __, 110 S.Ct. 1623, 1627 (1990) (statute did not authorize FLRA to require IRS to negotiate on "contracting-out" work).

B. The Commission Did Not Provide A Statement Of Reasons Why The Petitioners Did Not Meet The Threshold Requirements For A Review Under Section 751(b)(1).

The Commission is required to set forth the legal standard it applies and to provide an adequate explanation as to why the petitioners failed to satisfy the threshold requirement to obtain a review under Section 751(b)(1). *Dunlop* v. *Bachowski*, 421 U.S. at 573. In the absence of such a statement, and an articulation of the standard applied by the Commission, it is not possible for a court to conduct proper judicial review.[20] In this case, the Commission failed to provide the reviewing court with an adequate statement of reasons for its decision. This statement is vital to enable the court to determine whether the Commission has properly construed its mandate and whether it has acted in an arbitrary or capricious manner.

C. The Petitioners Satisfied The Statute's Requirements For The Commencement Of A Review.

Section 751(b)(1) provides that "[w]henever the . . . Commission receives . . . a request for review of [a dumping order] which

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[20] A recent comparative analysis of United States antidumping laws noted the detailed requirements established by the Trade Agreements Act of 1979, observing that, "[a] government official who has to justify every step he takes is bound to tread more carefully than one with unfettered discretion." E. Vermulst, *Antidumping Law in the United States and the European Communities: A Comparative Analysis* 65 (1987); *accord*, Jackson, *Perspectives on the Jurisprudence of International Trade*, *supra* at 1583. Congress has established a scheme designed to minimize the very *ad hoc* discretion the Federal Circuit has given it in this case.

shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review . . . ." 19 U.S.C. § 1675(b)(1). When properly viewed in light of the congressional scheme, it is clear that the petitioners' request for a review by the Commission met the threshold requirement of this provision.[21]

Congress imposed two discrete obligations on the Commission in Section 751(b)(1). The Commission's first obligation is to determine *whether* to initiate a review. The second is to determine the merits after a review is granted. Both are subject to judicial review, but different standards of review apply to the two different determinations.

The first obligation of the Commission is to determine whether a party has alleged "changed circumstances" sufficient to require the Commission to initiate formal review. This threshold determination is to be made on the basis of the allegations in the request for review, measured against the circumstances which justified the original dumping order. Congress has not provided for a hearing at this threshold stage and the decision of the Commission is not to be made on the basis of a full factual record. A threshold decision of the Commission *not* to initiate a review of the basis of changed circumstances is subject to judicial review to determine whether the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(A).

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[21] Section 751(b)(1) is the result of the new GATT Anti-dumping Code, which Congress implemented in the 1979 Trade Agreements Act, to prevent antidumping orders from becoming a permanent advantage to domestic competitors. Thus, the Code and the Act provide that dumping orders may remain in force *only* as long as necessary to counteract existing dumping which is causing injury. They provide that affected parties (such as petitioners herein) should be given a reasonable opportunity to show that changed circumstances warrant relieving the party of the burdens imposed by the antidumping order. *See supra*, Point I.

The Commission's refusal to even grant a review is consistent only with a recent observation that the antidumping and countervailing duty laws as applied are "for the most part an obstacle to free and fair trade." SCHOENBAUM, ANTIDUMPING AND COUNTERVAILING DUTIES AND THE GATT, *supra at* 1.

However, there is a critical difference between the application of this familiar standard of review to the Commission's threshold "changed circumstances" determination and the other contexts in which this Court has considered its application. Specifically, this standard is applicable in cases where the agency is obligated to and does develop a full factual record, which the court can review. *See, e.g., Overton Park; Motor Vehicle Mfrs. Ass'n.* That is *not* the situation here.[22]

Congress provided in Section 751(b)(1) that if the Commission determines that sufficient "changed circumstances" have been alleged to warrant review of an outstanding dumping order the Commission must then move to the second stage, initiate an investigation, and set the full factfinding process in motion. In the second stage, the party seeking to modify or vacate the order is entitled to a hearing, the Commission must investigate the factual claims of the parties, and the Commission's decision must be based on the factual record created. Congress specified a *different* standard of review for the Commission's final decision on the *merits*. It is to be held unlawful if "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). *See Matsushita Elec. Indus. Co., Ltd.* v. *United States*, 750 F.2d 927 (Fed. Cir. 1984). This is similar to the standard of the Administrative Procedure Act applicable to judicial review of an agency adjudication made on the record after a hearing. 5 U.S.C. § 706(2)(E). Thus, in Section 751(b)(1), Congress imposed two distinct obligations on the Commission.

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[22] This Court has considered at least one other statutory scheme, in the Interstate Commerce Act, 49 U.S.C. § 10327(g), which includes similar authority for an adjudicatory agency to review its own outstanding orders on the basis of "changed circumstances," *inter alia*. *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 278 (1987). The Court there held that it lacked jurisdiction to review the denial of a request for reopening or reconsideration based merely on a claim of prior error. However, the Court explained that a *refusal* of the ICC to reopen on the basis of "new evidence" or "changed circumstances" is subject to judicial review under the arbitrary or capricious test in 5 U.S.C. § 706(2)(A). *Id.* at 278-279. In addition, the Court noted that final result of a decision of the ICC to reopen a proceeding is subject to review on the merits.

The Commission in this case has confused its two obligations under Section 751(b)(1). Instead of deciding the limited threshold question of whether sufficient "changed circumstances" had been alleged by petitioners to warrant a full review, the Commission ruled on the merits of petitioners' claims. This is clear from the fact that the Commission's majority compared the respondents' factual allegations with those of the petitioners, and made "findings" of ultimate facts on the basis of that exercise. Congress did not authorize the Commission to make that kind of factual determination as part of the threshold inquiry. This failure of the Commission to properly limit its threshold determination to whether sufficient "changed circumstances" were alleged to warrant a review is contrary to the congressional mandate in Section 751(b)(1).

D. A 1984 Amendment To Section 751(b)(1) Supports The Petitioners' Construction Of The Act.

In 1984, Congress amended Section 751(b)(1) to add a provision stating that after the second stage investigation begins, "the party seeking revocation of an antidumping . . . order shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant revocation of the . . . order." Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 611(a)(2)(B)(iii), 98 Stat. 3031, amending 19 U.S.C. §1675(b)(1). This amendment further demonstrates that the threshold burden the petitioners bear must be, and is, substantially lower than the "burden of persuasion" imposed on them after a review is initiated. Again, the final decision on the merits is judicially reviewable to determine if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

Thus, examination of Section 751(b)(1) demonstrates that the Commission has distorted the congressional scheme in at least two ways. First, the Commission by regulation gave notice of the initial filing of a request for review, 19 C.F.R. § 207.45(a), which is not specifically authorized under the Act, and immediately turned the threshold question whether sufficient

changed circumstances have been shown into a full adversarial proceeding.[23] Congress only provides for public notice *after* the Commission decides to initiate a review under Section 751(b)(1).

Second, during the initial stage, the Commission weighed the conflicting evidence and reached a conclusion as to ultimate facts without conducting the investigation required by Congress. Thus, the Commission has, without any congressional mandate, and *sub silentio*, merged the two distinct phases of the review process established by Congress in Section 751(b)(1).

Unfortunately, the Federal Circuit simply and repeatedly asserted that the Commission had power to make *ad hoc* determinations (App. A, 6a-9a) and failed to properly construe Section 751(b)(1)'s limitation on the threshold "changed circumstances" determination the Commission is required to observe. Thus, the Federal Circuit allowed the Commission to impose an excessive standard of persuasion on petitioners, and allowed the Commission to fully explore and weigh the "facts," based on respondents' dispute of petitioners' allegations. That is precisely what the Commission is not authorized to do at the threshold. The Commission may weigh and determine the facts only after it has initiated a formal review and conducted an adjudication on the record, including a hearing, if requested, as required by Congress.

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[23] Petitioners' request for review consisted of a 76 page document; the request included extensive data regarding imports of Swedish steel, production of domestic companies, and production capacities. The petition was opposed by various domestic companies which submitted an equally lengthy brief disputing many of the assertions of petitioners. Neither the statute nor the Commission's regulations required that any of the factual assertions be accompanied by affidavits or be otherwise substantiated. Congress added a provision in 1988 requiring that a person submitting factual information to the Commission include a certification "that such information is accurate and complete to the best of that person's knowledge." 19 U.S.C. § 1677e(a).

III

THE COMMISSION'S DENIAL OF THE REQUEST FOR REVIEW WAS ARBITRARY AND CAPRICIOUS AND PETITIONERS WERE DENIED MEANINGFUL JUDICIAL REVIEW.

In addition to wrongfully applying an erroneous threshold standard, the Commission's determination not to initiate review of the 1973 dumping finding is arbitrary and capricious under 19 U.S.C. § 1516a(b)(1)(A). Although the judicial standard of review is narrow, the Federal Circuit failed to conduct the "thorough, probing, in-depth review" required by this Court. *Citizens to Preserve Overton Park*, 401 U.S. at 415. Instead, the Federal Circuit repeatedly emphasized its view that the Commission had the power to make *ad hoc* decisions under Section 751(b)(1). Based on this view, the court failed to conduct any meaningful review of the decision.

This Court has stated that a reviewing court "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" *BATF* v. *FLRA*, 464 U.S. 89, 97 (1983) (citation omitted). In fact, this Court has summarized the factors a court must consider when reviewing an agency determination under the "arbitrary and capricious" standard. Among the factors are the following:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . . The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Motor Vehicle Mfrs. Ass'n v. *State Farm Mutual Ins. Co.*, 463 U.S. at 43.[24] Similarly, this Court has stated that an agency

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[24] There, the Court was reviewing the decision of an agency to revoke an automobile safety standard. The Court noted that Congress provided that

(Footnote continued)

official's refusal to initiate an action on behalf of a union member in an election was not only subject to judicial review, but that the agency official was required to provide a statement of reasons to enable a reviewing court to act "'if it should clearly appear that the Secretary has acted in an arbitrary and capricious manner by ignoring the mandatory duty he owes plaintiffs under the powers granted by Congress.'" *Dunlop* v. *Bachowski*, 421 U.S. at 568.

Here, the Federal Circuit did not subject the Commission's decision to this kind of scrutiny. After devoting most of its opinion to refuting the petitioners' claim that the Commission did not employ the correct standard to the request for review, the Federal Circuit disposed of its analysis of the Commission's substantive decision in barely a page (App. A, 9a-10a).

The petitioners' 1987 review request demonstrated that profound changes occurred in America's stainless steel plate market since the early 1970's. The request for a review grouped these changes under six headings, although they are linked to each other in many respects: (1) the acquisition of the New Castle mill and the resulting change in Avesta's importing behavior;[25] (2) the *de minimis* import levels; (3) the strength of Avesta's markets in Western Europe; (4) the restructuring of the Swedish industry; (5) the protection of the U.S. industry through the VRA program; and (6) the competitive disadvantage of the petitioners as against other exporters. These undisputed changes in the petitioners' importing activities and United States market overwhelmingly establish that circumstances have changed since the early 1970's.

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informal rulemaking in that case be made on the record and that the record be submitted to the reviewing court for review under the "substantial evidence" test. However, in applying the standard in this case, it is critical to recognize that the Commission was not engaged in rulemaking and did not have a factual record before it at this stage.

[25] Two of the commissioners determined that this new acquisition alone provided sufficient "changed circumstances" to initiate a review (App. F, 40a).

In addition to seeking an investigation leading to revocation, the petitioners sought a review to determine whether the finding of dumping should be modified by excluding Avesta's wide "KBR Plate" and two patented grades of plate. The majority commissioners utterly failed to even mention the petitioners' request for modification. They wholly failed to explain whether they considered KBR Plate and the two patented products for purposes of an investigation leading to modification, or merely for purposes of possible revocation.

The alleged "changed circumstances" asserted by the petitioners in this case were obviously sufficient to require the Commission to initiate a review investigation to determine whether the 1973 finding of dumping should be revoked under Section 751(b)(1). The majority commissioners' determination to the contrary lacks a rational basis in fact and is not in accordance with law, particularly when viewed in light of the proper *threshold* standard petitioners are required to satisfy, which is *not* a burden of persuasion. The Commission might or might not conclude, after a full investigation, and with a factual record before it, that the petitioners have failed to carry the "burden of persuasion" on the merits. But the petitioners' allegations on their face show dramatic changes in their import behavior, based on their acquisition of a United States plant in 1976, the level of imports, and market conditions, to require the Commission to at least conduct an investigation to determine whether the domestic industry still needs the protection of the antidumping finding after the passage of eighteen years.

Proper application of the arbitrary and capricious test to the Commission's determination not to initiate a review should have resulted in a rejection of the Commission majority's analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 13, 1990

APPENDIX

TABLE OF CONTENTS

APPENDICES	Page
A. Decision of the United States Court of Appeals for the Federal Circuit, filed September 14, 1990	1a
B. Notice of the United States Court of Appeals for the Federal Circuit revising Official Caption, filed September 14, 1990	11a
C. Opinion of the United States Court of International Trade, filed October 27, 1989	12a
D. Notice of Decision of International Trade Commission, dated June 26, 1987, 52 Fed. Reg. 24541 (July 1, 1987)	31a
E. Views of Commissioners Alfred Eckes, Seeley Lodwick, and David Rohr, International Trade Commission	34a
F. Views of Chairman Susan Liebeler and Vice Chairman Anne Brunsdale, International Trade Commission	40a
G. Notice of Finding of Dumping, filed June 7, 1973, 38 Fed. Reg. 15079 (June 8, 1973)	41a
H. Determination of Injury in Investigation No. AA1921-114, *Stainless Steel Plate From Sweden*, United States Tariff Commission, TC Publication 573 (May 1973)	43a
I. Statutes Involved	49a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-1120

AVESTA AB and AVESTA STAINLESS, INC.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee,

ALLEGHENY LUDLUM STEEL CORPORATION, ARMCO INC., JESSOP STEEL CORPORATION, J & L SPECIALTY PRODUCTS COMPANY, WASHINGTON STEEL CORPORATION, and UNITED STEELWORKERS OF AMERICA, AFL/CIO-CLC,

Defendants.

Patrick C. Reed, Freeman, Wasserman & Schneider, of New York, New York, argued for plaintiffs-appellants. With him on the brief was *Jack Gumpert Wasserman*.

Stephen McLaughlin, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendant-appellee. With him on the brief were *Lyn M. Schlitt*, General Counsel and *James A. Toupin*, Assistant General Counsel. *Jeffrey Beckington*, Collier, Shannon & Scott, of Washington, D.C., argued for defendants. With him on the brief was *Paul C. Rosenthal*.

Appealed from: U.S. Court of International Trade

Judge Carman

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-1120

AVESTA AB and AVESTA STAINLESS, INC.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee,

ALLEGHENY LUDLUM STEEL CORPORATION, ARMCO INC., JESSOP STEEL CORPORATION, J & L SPECIALTY PRODUCTS COMPANY, WASHINGTON STEEL CORPORATION, and UNITED STEELWORKERS OF AMERICA, AFL/CIO-CLC,

Defendants.

DECIDED: September 14, 1990

Before MARKEY, *Circuit Judge** BENNETT, *Senior Circuit Judge*, and CONTI, *Senior District Judge*.**

CONTI, *Senior District Judge*.

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* Circuit Judge Markey vacated the position of Chief judge on 27 June 1990.

** The Honorable Samuel Conti, Senior District Judge, United States District Court for the Northern District of California, sitting by designation.

DECISION

Avesta AB and Avesta Stainless, Inc. (collectively Avesta) appeal from a decision of the Court of International Trade affirming the determination of the United States International Trade Commission (ITC) not to institute a review under section 751(b) of the Tariff Act of 1930, (19 U.S.C. § 1675(b)), of an outstanding antidumping order for imported stainless steel plate from Sweden. We affirm.

BACKGROUND

In 1973, the United States Tariff Commission issued a finding that over the previous several years Swedish stainless steel plate was being dumped in the domestic market at less than fair value, and that these imports were causing material injury to a domestic industry. An antidumping order was issued and remains in effect today.[1] In 1985, Avesta AB, the sole Swedish producer and exporter of stainless steel plate, along with its domestic affiliate, Avesta Stainless, Inc., sought under 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b), to have the 1973 antidumping order revoked or modified in light of changed circumstances. Section 751(b) provides that the ITC shall conduct a full investigation of whether to revoke an antidumping order whenever the ITC receives a request which it determines as a threshold matter "shows changed circumstances sufficient to warrant a review." 19 U.S.C. § 1675(b)(1). The ITC dismissed Avesta's 1985 review request after finding that none of the circumstances cited by Avesta constituted a sufficient change in circumstances to warrant investigation. This decision was upheld by the Court of International Trade. *Avesta v. United States*, 689 F. Supp. 1173 (Ct. Int'l Trade 1988) (*Avesta I*).

In 1987, after amending its list of alleged changed circumstances, Avesta again petitioned for a section 751(b)

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[1] The antidumping order was published in the Federal Register, 38 Fed.Reg. 15,079 (1973).

investigation of the 1973 antidumping order.[2] The ITC, by a three-to-two margin, once more determined that Avesta did not show sufficient changes in circumstances to warrant further review. As before, the Court of International Trade affirmed the ITC's decision. *Avesta AB v. United States*, 724 F. Supp. 974

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[2] The eight alleged changes in circumstances raised in plaintiffs' 1987 petition for review before the ITC were:

> 1. The number of stainless steel producers in Sweden declined from four in 1972 to a single producer in 1987 and Sweden's capacity to produce stainless steel has declined as a result;
>
> 2. Imports of hot-rolled stainless steel plate have been and remain at *de minimis* levels;
>
> 3. The *de minimis* levels of imports from Sweden result from the 1976 acquisition of a U.S. hot-rolled plate producing mill by Avesta;
>
> 4. Swedish steel experts to the European Community (EC) rose sharply after it was allowed duty-free entry in the EC in 1972.
>
> 5. In contrast to the early 1970s, Voluntary Restraint Agreements (VRAs) setting export quotas were signed by a number of competitor countries, except Sweden, thereby adding a measure of protection for U.S. producers of stainless steel;
>
> 6. The fact that Sweden has not entered into a VRA places Avesta at a competitive disadvantage because its exports remain subject to antidumping and countervailing duties while those from VRA countries do not;
>
> 7. That Avesta produces a continuously made cold-rolled plate in widths which U.S. firms are unable to produce; and,
>
> 8. Avesta's current exports to U.S. include two types of stainless steel plate that are patented, which did not exist in the 1970s, and which U.S. firms cannot supply.

The petition to the ITC asked that the order at least be modified to exclude the allegedly uniquely Swedish products described in paragraphs 7 and 8 above. The court notes that the first four items above were raised in Avesta's 1985 petition and, as such, had previously been rejected by both the ITC and the Court of International Trade.

(Ct. Int'l Trade 1989) (*Avesta II*). It is from that affirmance that Avesta appeals.

ISSUE

Was the Court of International Trade correct in holding that the determination by the ITC not to commence an investigation to review the 1973 antidumping order was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

OPINION

The standard of review is undisputed. The ITC's determination not to institute a review investigation under section 751(b) must stand unless "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516(b)(1)(A). Nonetheless, Avesta raises an issue of first impression in arguing that the ITC made a clear error of law by failing to apply the appropriate legal standard as to what qualifies as "changes in circumstances *sufficient to warrant review*" under section 751(b). 19 U.S.C. § 1675(b)(1) (emphasis added). Essentially, Avesta's contention is that the critical statutory language—"sufficient to warrant review"—is not self-executing in terms of the level of persuasion required at this initial inquiry stage and does not guide or in any meaningful way constrain the ITC's exercise of discretion. In fact, Avesta asserts that in this case, given the indeterminate meaning and application of these critical terms in section 751(b), the ITC's decision does not manifest that any guiding legal standard was applied in reaching the conclusion that appellant did not show changed circumstances sufficient to warrant review.

Rather than leaving it to the ITC to interpret according to the ultimately indeterminate terms of section 751(b) what level of persuasion is necessary to trigger a review investigation, plaintiffs suggest that *"a reasonable appearance"* of changes in circumstances should be the rule of decision regarding the sufficiency of alleged changes to warrant a review. Petitioner cites

in support of this standard the fact that at issue here is a threshold inquiry. Congress's imposition of the ultimate burden of persuasion in the investigation under section 751(b) on petitioner would be mere surplusage, Avesta contends, if a petitioner is held to the same standard of proof at the initial inquiry stage. *Cf. Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927 (Fed. Cir. 1984) (granting a review request does not constitute proof that revocation is mandated but merely sets the review process in motion). Finally, Avesta argues that an unfairly high burden forces decisions to be made on incomplete factual records and frustrates statutory intent that antidumping duties be remedial rather than punitive – that they be imposed only where material injury to domestic industry will persist.[3]

The court agrees with appellant insofar as it asserts that the critical language in section 751(b) contains less than exacting standards of decision. The real issue, though, is whether congressional intent compels this court to impose further standards on the ITC's determinations or, as appellees argue, whether Congress delegated the decision as to what constitutes a change in circumstances sufficient to warrant a review investigation to the discretion of the ITC to be determined on a case-by-case basis. After canvassing the legislative history and discernable congressional intent, we agree with the latter position.

The genesis of section 751(b) reveals that even prior to the enactment of the statute in 1979, it was the practice of the ITC to entertain requests for reviews of existing injury determinations on an *ad hoc* basis.[4] In 1974, the Senate Committee on

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[3] *See* Agreement on Interpretation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, art. 9, para. 1, 31 U.S.T. 4919, T.I.A.S. No. 9650.

[4] The regulatory origins and prior history of section 751(b), as codified in 19 U.S.C. § 1675(b)(1), are more fully recounted in *Avesta I. Avesta AB v. United States*, 689 F. Supp. 1173, 1178-1179.

Finance explicitly approved such practices and even rejected efforts to codify the reconsideration process along the lines of section 751(b). The Committee stated:

> [P]roposals to include statutory language regarding certain concepts and terms, such as . . . reconsideration of agency determinations and findings . . . were not accepted for the reason that the Committee believes that the matters involved are adequately treated under existing practices and *are best left to individual case determinations without additional statutory guidelines.*

S. Rep. No. 1298, 93d Cong., 2d Sess. 178-179, 181 (1974) (emphasis added). In 1977, the ITC promulgated a regulation which formally adopted this practice:

> (c) *Institution of investigation.* The ITC may institute an investigation . . . upon receipt of an application . . . from an interested person specifying the changed circumstances forming the basis for review. . . .

19 C.F.R. § 207.5(c) (1978). Congress was fully aware of this regulation and practice when, in 1979, it repealed the Antidumping Act of 1921, 19 U.S.C. § 160 (1921) and replaced it with the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 107, 93 Stat. 144, 193, (1979), which incorporated section 751(b). S. Rep. No. 249, 96th Cong., 1st Sess. 79-81 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 71-72 (1979). In light of this history, Congress's knowing choice of the "sufficient to warrant review" language in section 751(b) manifests its intent that the review process continue to proceed on a case-by-case basis.

In 1984, Congress discussed and enacted amendments to section 751 in the Tariff and Trade Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984). The court finds it persuasive that the detailed amendments to section 751 left untouched the *ad hoc* nature of ITC decisions to institute review. *See Kelly v. United*

States, 826 F.2d 1049, 1052 (Fed. Cir. 1987) (Congress adopts administrative interpretation of statute when it reenacts statute unchanged). Certainly there was ample evidence of the ITC's practice under section 751(b).[5] If Congress had felt it necessary to curtail its broad delegation of discretion to the ITC in these matters, it could have supplemented the statutory language of section 751(b) with the "reasonable indication" standard it employed for preliminary determinations of injury, 19 U.S.C. 1673b(a), or it could have injected some other standard such as the "reasonable appearance" standard proposed by Avesta. Significantly, Congress chose not to do so.

Finally, Congress's adoption of a limited standard of judicial review of the ITC's determinations under section 751(b) further manifests its intent to broadly commit such decision to the discretion of the agency. In choosing such a narrow standard of review Congress specifically deferred to the agency's expertise and "entrusted the decision-making authority in a specialized, complex economic situation to administrative agencies." S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979). Indeed, the Supreme Court has instructed that because the arbitrary and capricious standard applies in areas of special agency expertise, substantial deference must be afforded the agency's determinations so long as they possess a rational basis in fact. *Consolo v. Federal Maritime ITC*, 383 U.S. 607, 620-21 (1966); *Zenith Radio Corp.v. U.S.*, 437 U.S. 443, 450-01 (1978); *See also American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986).

The court finds that Congress's approval of the *ad hoc* administration of section 751(b) emerges from the examination of the evolution, language, applicable standard of review and subsequent history of this provision. The ITC's finding that Avesta

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[5] The *ad hoc* approach to initiating review investigations was manifest in a series of ITC decisions between 1980 and 1984. *See e.g.*, Birch Three-Ply Door Skins From Japan, Inv. No. 751-TA-6, USITC Pub. 1271 (July, 1982); Salmon Gill Fish Netting of Manmade Fibers From Japan, Inv. No. 751-TA-5, USITC Pub. 1234 (March, 1982).

had not established changed circumstances sufficient to warrant review was, in fact, an "exercise of discretion . . . predicated upon judgment anchored in the language and spirit of the relevant statutes and regulations." *Freeport Minerals Co. v. United States*, 776 F.2d 1029, 1032 (Fed. Cir. 1985). As such, its conclusion was in no sense an error of law. What remains, then, is appellant's contention that the ITC's decision was arbitrary and capricious and an abuse of discretion.

The ITC determined, after evaluating the record, that Avesta's alleged changed circumstances, many of which had recently been rejected by the ITC and the Court of International Trade in *Avesta I*, were either the direct and anticipated result of the imposition of import relief, were unsupported by the record, or had no significant connection to the impact of dumped Swedish stainless steel plate on domestic industry. For instance, the fact that imports declined and are presently *de minimis* was found to be an expected result of the antidumping order. The acquisition of a domestic mill did not, the ITC majority concluded, sufficiently alter Avesta's import practices. Avesta's monopolization of the Swedish industry, while decreasing its absolute productive capacity, still left sufficient unused productive capacity according to the ITC to enable Avesta to dump plate here and still satisfy its domestic and other foreign markets. The allegation of increases in exports to the European Community evaporated under scrutiny by the ITC. In addition, the existence of VRA's, which placed no restrictions on the quantity of Swedish imports while subjecting signatory nations to quotas, was determined not to affect the impact of such exports on the domestic industry. Finally, the ITC concluded after conducting a like-product analysis that the allegedly uniquely Swedish types of plate were neither factually nor legally entitled to "exclusion." The court concludes after independently assessing the record and arguments before it that the ITC's determination that Avesta had not demonstrated changes sufficient to warrant review was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Further elaboration, in light of the trial court's thorough and well reasoned examination of this issue, *Avesta AB v. United States*, 724 F. Supp. 974, would only add

needless redundancy and therefore the court adopts the examination and reasoning of that opinion as its own.

CONCLUSION

For the reasons stated above, the Court of International Trade's decision in this case is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REVISED: 09/14/90

Official Caption[1]

90-1120

AVESTA AB and AVESTA STAINLESS, INC.,

Plaintiffs-Appellants,

v.

THE UNITED STATES, ALLEGHENY LUDLUM STEEL CORPORATION, ARMCO INC., JESSOP STEEL CORPORATION, J & L SPECIALTY PRODUCTS COMPANY, WASHINGTON STEEL CORPORATION, and UNITED STEELWORKERS OF AMERICA, AFL/CIO-CLC,

Defendants-Appellees.

Authorized Abbreviated Caption[2]

AVESTA AB V US, 90-1120

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[1] Required for use on petitions, formal briefs and appendices, court opinions, and dispositive court orders. FRAP 12(a); 32(a).

[2] Authorized for use only on items not requiring the Official [caption as listed in note 1; sentence incomplete in original].

APPENDIX C

AVESTA AB and Avesta Stainless, Inc., Plaintiffs,

v.

UNITED STATES, Defendant,

and

Allegheny Ludlum Steel Corp., Armco Inc., Jessop Steel Corp., J & L Specialty Products Corp., Washington Steel Corp. and United Steelworkers of America, AFL/CIO-CLC, Defendants-Intervenors.

Court No. 87-07-00799.

United States Court of International Trade.

Oct. 27, 1989.

Freeman, Wasserman & Schneider, Jack Gumpert Wasserman, Patrick C. Reed, New York City, for plaintiffs.

Lyn M. Schlitt, Gen. Counsel, James A. Toupin, Asst. Gen. Counsel, Office of the Gen. Counsel, U.S. Intern. Trade Com'n, and Jack M. Simmons, III, Washington, D.C., for defendant.

Collier, Shannon, Rill & Scott, David A. Hartquist, Paul C. Rosenthal, and Patrick B. Fazzone, Washington, D.C., for defendants-intervenors.

OPINION

CARMAN, Judge:

Plaintiffs seek review of the determination of the United States International Trade Commission (hereinafter Commission or

ITC) not to institute an investigation under section 751(b) of the Tariff Act of 1930 (19 U.S.C. § 1675(b) (1982 & Supp. V. 1987) to determine whether an industry in the United States would be materially injured, threatened with material injury or whether the establishment of an industry in the United States would be materially retarded by reason of dumped imports of stainless steel plate from Sweden if the outstanding antidumping duty order on that merchandise were modified or revoked. 52 Fed.Reg. 24,541 (1987).

BACKGROUND

On May 1, 1973, the United States Tariff Commission (now known as the International Trade Commission) determined that an industry in the United States was materially injured by reasons of imports of stainless steel plates from Sweden which the Secretary of the Treasury had determined to be sold at less than fair value. *Stainless Steel Plate from Sweden*, TC Pub. No. 573, Inv. No. AA1921-114 (1973). On June 5, 1973 the Department of Treasury issued a finding of dumping (T.D. 73-157) and notice was filed in the Federal Register. 38 Fed.Reg. 15,079 (1973).

On July 8, 1985, plaintiffs Avesta AB and Avesta Stainless, Inc. filed their first request pursuant to section 751(b) of the Tariff Act of 1930 with the ITC to review the Commission's affirmative decision in investigation number AA1921-114. The Commission determined that plaintiffs' petition did not show changed circumstnaces sufficient to warrant a review of the investigation. 50 Fed.Reg. 43,613 (1985). Plaintiffs brought an action in this Court seeking an order invalidating and vacating the Commission's determination. Plaintiffs' motion was denied and the determination was sustained. *Avesta AB v. United States*, 12 CIT —, 689 F.Supp. 1173 (1988) (hereinafter *Avesta I*).

On February 25, 1987 plaintiffs made a second request pursuant to section 751(b) of the Tariff Act of 1930, to review the affirmative determination in the investigation. The Commission again determined pursuant to 19 U.S.C. § 1675(b) and 19 C.F.R. § 207.45 (1987) that the petition did not show changed

circumstances sufficient to warrant institution of a review investigation. 52 Fed.Reg. 24,541 (1987).

Plaintiffs commenced the instant case seeking an order invalidating and vacating the Commission's determination pursuant to the second review request.

CONTENTIONS OF THE PARTIES

Plaintiffs' Contentions

Plaintiffs allege that the following are changed circumstances sufficient to warrant review of the ITC's determination:[1]

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[1] At oral argument parties were given the opportunity to submit briefs distinguishing *Avesta I* from the instant case since *Avesta I* was decided after the parties had submitted their briefs for the instant case. The parties also submitted summaries of contested agency findings and a statement of reasons underlying those findings. The alleged changed circumstances listed in the text are based upon those originally included in plaintiffs' petition and information from the additional briefs. The eight alleged changed circumstances set out in plaintiffs' review petition were:

(1) In a series of corporate consolidations in Sweden, the stainless steel plate industry has shrunk from four producers in 1972 to a single producer in 1987, with a consistently decreasing capacity to produce stainless steel products;

(2) Imports of hot-rolled stainless steel plate from Sweden have been and remain at *de minimis* levels;

(3) The *de minimis* levels of imports from Sweden result from the 1976 acquisition by plaintiffs of a hot-rolling plate producing mill in New Castle, Indiana;

(4) In contrast to the early 1970s, the European Community is a growing market for Swedish plate and Swedish plate enters the European Community without quantitative restrictions and duty-free;

(5) United States producers are highly protected due to the negotiation and implementation of voluntary restraint agreements with countries whose producers are the major foreign suppliers to the United States market;

(Footnote continued)

(1) The 1976 acquisition by plaintiffs of the New Castle, Indiana mill resulted in the following changes:

(a) the average annual import volume and import penetration ratio decreased by more than sixty percent after the acquisition, taking into account the exclusion of three non-stainless-steel-plate products from the import statistics;

(b) total imports and imports as a percentage of apparent consumption were lower in every year after the acquisition than they were during the first year plaintiffs owned the mill, or in 1974 and 1975, the only full years before the acquisition when the finding of dumping was in effect;

(c) The import statistics show that import levels decreased significantly after plaintiffs' acquisition of the Indiana mill. Plaintiffs contend that this result was independent of the finding of dumping and that the current import levels are *de minimis*; and

(d) Plaintiffs have made changes in import behavior such as decreasing their imports significantly after acquiring the Indiana mill and changing their product mix by discountinuing their imports of hot-rolled plates of standard stainless steel grades;

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(6) Sweden has not entered into a voluntary restraint agreement with the United States therefore its exports to the United States remain subject to antidumping and countervailing duties, while those from countries with voluntary restraint agreements are not;

(7) Sweden supplies the United States' demand for cold-rolled plate in widths which United States firms are unable to supply; and

(8) Certain patented types of stainless steel plate that did not exist in the 1970s and are not produced in the United States are being exported from Sweden to the United States.

Petition for Review Investigation and Revocation or Modification of "Finding of Dumping" Against Stainless Steel Plate From Sweden Issued on June 7, 1973, Record Document (hereinafter R.Doc.) 1 (hereinafter Petition for Review) at 4-7.

(2) The quantity of imports of three non-stainless-steel-plate products are set forth in the review request and their exclusion is requested from the import statistics;

(3) The voluntary restraint agreements (hereinafter VRAs) that have been established since the filing of the first review request resulted in the following changes:

(a) plaintiffs are now placed at a competitive disadvantage in pricing as compared to imports from VRA countries; and

(b) the VRA program has contributed to an improvement in the condition of the United States industry, thereby decreasing the likelihood that the industry would suffer material injury in the event of revocation;

(4) Swedish exports of hot- and cold-rolled stainless steel plate to European Community (hereinafter EC) member-countries increased by over 250 percent from 1971 to 1985. The second review request contains a data series which lists exports of hot- and cold-rolled stainless steel plate from Sweden to the EC from 1971 through the first nine months of 1986;

(5) In 1986, plaintiffs began exporting cold-rolled plate to the United States. Therefore exports of cold-rolled plate to the European Community are no longer irrelevant to the ITC's determination;

(6) The second review request asked the Commission to institute an investigation to determine whether the finding of dumping should be modified to exclude future imports of two patented products and the wide KBR Plate which the Review Request shows to be the only continously-made cold-rolled stainless steel plate in widths of sixty inches or more; and

(7) In a series of corporate consolidations in Sweden, the stainless steel plate industry has shrunk from four producers in 1972 to a single producer in 1987, with a consistently decreasing capacity to produce stainless steel products.

Defendant's and Defendant-Intervenors' Contentions

Defendant and defendant-intervenors contend that the determination of the Commission was not arbitrary, capricious or an abuse of discretion and was in accordance with law and therefore should be upheld in all respects.[2]

STANDARD OF REVIEW

The Commission has determined that plaintiffs' review request "d[id] not show changed circumstances sufficient to warrant institution of a review investigation." Views of Commissioners Alfred Eckes, Seeley Lodwick, and David Rohr, R. Doc. 17 (hereinafter Views of Commissioners) at 7. In *Avesta I*, this Court stated that "the standard applicable in a preliminary injury determination under § 1673b(a) is different from the standard governing a determination of changed circumstances sufficient to warrant review of an affirmative injury determination." 12 CIT at —, 689 F.Supp. at 1175. This Court noted:

> [W]hile the decision to undertake a review is a threshold question, this decision, pursuant to statute and regulations, may be made only when it reasonably appears that positive evidence adduced by the petitioner together with other evidence gathered by the Commission leads the ITC to believe that there are changed circumstances sufficient to warrant review. . . . [T]he party seeking revocation bears the initial burden of showing the existence of such [changed] circumstances. The party need not establish that the crucial factors that lead to the ITC's affirmative injury determination no longer exist since the application of such a burden would eliminate the need for a review investigation once the decision to undertake one has been made.

12 CIT at —, 689 F.Supp. at 1181 (footnote omitted).

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[2] Since defendant and defendant-intervenors filed joint briefs, the term defendant is used throughout to refer to both parties.

Plaintiffs contend that the ITC's determination does not set forth any standard of law and that defendant's brief argues that (1) the Commission has uncircumscribed discretion to decide whether changed circumstances are sufficient to warrant a review and (2) the petitioner must sustain the same full burden of proof in the threshold changed circumstances determination and the ultimate revocation determination.

Defendant denies that either the Commission or its counsel has ever asserted that the ITC has "uncircumscribed discretion" or that a petitioner must bear the same burden in the instituting stage as in the actual investigation.

The standard of review of a decision not to institute a section 751(b) investigation is whether the determination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. §§ 1516a(a)(1)(B), 1516a(b)(1)(A) (1982 & Supp. V 1987). This standard of review "is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246, 9 L.Ed.2d 207 (1962)).

Plaintiffs specifically contend that (1) the three majority commissioners failed to apply the correct legal standard and failed to articulate any applicable legal standard and (2) the findings by the three majority commissioners are contradicted by the administrative record and lack rational basis in fact.

NEW CASTLE MILL ACQUISITION

Average Annual Import Volume and Import Penetration Level

[1] Plaintiffs contend that the average annual import volume and import penetration ratio decreased by more than sixty

percent after the acquisition of the mill, taking into account the exclusion of three non-stainless-steel-plate products from import statistics. Defendant responds that the same substantive argument was made in *Avesta I* and rejected by this Court. In *Avesta I*, the following argument was made:

> Plaintiffs argue that the decrease in imports from Sweden is not a result of import relief but is a result of the other alleged changed circumstances, particularly the acquisition of the New Castle steel mill by a predecessor of Avesta. Plaintiffs assert that from 1976 (the year in which the New Castle Mill was acquired) through 1984, average annual imports have been 940 net tons. This level, plaintiffs contend, is less than 60% of the average level in the two years immediately preceding the acquisition. Plaintiffs further dispute the ITC's conclusion that imports of Swedish plate have remained relatively constant since the imposition of the antidumping duty order.

12 CIT at —, 689 F.Supp. 1183.

This Court agrees that the plaintiffs' current claim, in substance, is the argument that was rejected in *Avesta I*, and finds the argument to be no more persuasive now than it was in the past. This Court finds that plaintiffs have not offered sufficient reasoning to show that the decline in imports was the result of anything other than import relief. This Court holds that the ITC's determination that the average annual import volume and the import penetration level did not constitute changed circumstances sufficient to warrant review was not arbitrary, capricious or an abuse of discretion and was in accordance with law.

Decrease in Import Levels

[2] Plaintiffs contend that import levels have decreased due to the acquisition of the mill. Specifically, plaintiffs claim that (1) total imports and imports as a percentage of apparent consumption were lower every year after the acquisition and (2) the

decrease was independent of the finding of dumping and current import levels are *de minimis*. These issues are closely related to the argument quoted above. In their determination the Commissioners stated:

> A decline in exports is an expected result from the imposition of an order. Moreover, plate imports, including those from Sweden, have been subject to quotas and additional duties during portions of the years since 1973 including, for example special duties imposed pursuant to section 202 of the Trade Act of 1974. The current allegation is not in any significant respect different from the allegation rejected by the Commission in 1985. The Commission again finds that petitioners have offered no legally sufficient reason why the current levels of plate imports are the result of anything other than import relief.

Views of Commissioners at 4 (footnote omitted).

This Court agrees that there is ample evidence in the record for the Commission to come to the rational conclusion that the decline in import levels is related to the imposition of the antidumping order. This Court finds that the Commission's determination that the decrease in import levels did not constitute a changed circumstance sufficient to warrant review was not arbitrary, capricious or an abuse of discretion and was in accordance with law.

Changes in Import Behavior

[3] Plaintiffs claim that they have made changes such as decreasing their imports significantly, eliminating imports of hot-rolled plate sold in the United States market and reducing their production capacity for stainless steel plate all as a result of the acquisition of the Indiana mill.

Plaintiffs alleged in their post-argument brief that a change in the structure of the Swedish industry has also led to a change in the mix of imported plate. Defendant notes that this allegation

was not made in plaintiffs' petition before the Commission. Defendant also points out that this change in product mix was linked to the purchase of the Indiana mill, but was not linked to the restructuring of the Swedish steel industry.

The Commissioners stated in their determination:

> Unlike their 1985 petition, petitioners now assert that acquisition of the mill caused a substantial shift in their market strategy and that the New Castle mill is used to supply the majority of petitioners' hot-rolled plate for the U.S. market. They state that they intend to use the U.S. facility for hot-rolled plate except for specialty types. Their data, however, show that exports of Swedish plate to the U.S. are predominantly hot-rolled, including a very substantial percentage of standard types. We conclude that that [sic] the Swedish producers have offered no additional argument to support their assertion that exporters have significantly altered their long-term practices with regard to exports of plate to the United States.

Views of Commissioners at 4-5.

Defendant notes that data included in plaintiffs' petition for review investigation indicates significant imports of hot-rolled steel. Petition for Review at 34-36.

This Court is not convinced that plaintiffs' import behavior has changed substantially. This Court determined in *Avesta I* that the purchase of the Indiana mill did not constitute a changed circumstance and plaintiffs have not provided sufficient reasoning to decide the issue differently at this time. This Court holds that the Commission's determination that the acquisition of the Indiana mill leading to changes in import behavior does not constitute a changed circumstance sufficient to warrant review was not arbitrary, capricious or an abuse of discretion and was in accordance with law.

EXCLUSION OF THREE NON-STAINLESS STEEL PRODUCTS

[4] Plaintiffs have requested the exclusion of what they claim are three non-stainless-steel-plate products (Stavex, Ramex and

Type 904L) from the import statistics. They contend that the Commission failed to explain whether the three products were included or excluded in the antidumping order. Plaintiffs also contend that the compositions of Stavex and Ramex were derived from tool steel compositions and therefore do not fall into the category of standard grades of stainless steel products.

Defendant argues that (1) the fact that Stavex and Ramex were derived from tool steel does not mean they are not stainless steel plate; (2) plaintiffs did not define standard grades of stainless steel; (3) plaintiffs did not allege that the chemical composition of the two products differs from that of stainless steel and, in fact, the chemical composition of the two products falls within the definition of stainless steel in the tariff schedule; (4) by plaintiffs' description, the two products appeared to be interchangeable in many uses with stainless steel; and (5) the two products have been treated as plate in the tariff schedule and in other official United States statistics and plaintiffs have not alleged that the two products have been misclassified.

Defendant also points out that the Commission acknowledges that Type 904L should be deducted from the import statistics because it is not encompassed within the antidumping order at issue. However, defendant adds that the volume of Type 904L imports was very small.

[5] This Court agrees that Type 904L should be deducted from the import statistics since it is not covered by the antidumping order. Since Type 904L was imported in such small quantity, it would not appear to have affected the general trend of plaintiffs' import statistics for purposes of this review. On the basis of ample evidence in the record detailing the properties of Stavex and Ramex, the Commission's decision to include these two products within the import statistics and to implicitly include Stavex and Ramex in the antidumping order was not arbitrary, capricious or an abuse of discretion and was in accordance with law.

VOLUNTARY RESTRAINT AGREEMENTS

[6] Plaintiffs contend that they have been placed at a competitive disadvantage in pricing due to VRAs in the steel industry.

These VRAs were not in effect at the time *Avesta I* was decided and the United States does not have a VRA with Sweden. Plaintiffs argue that since VRAs are in effect between the United States and almost all of the major steel exporting countries, the United States has insulated itself from competition, exempted VRA countries from the antidumping and countervailing duty laws and eliminated these countries from escape clause duties (19 U.S.C. § 2251 (1982 & Supp. V 1987)). Plaintiffs further contend that the VRA program has contributed to an improvement in the condition of the United States steel industry, decreasing the likelihood that it would suffer material injury in the event of revocation of the antidumping order.

The Commissioners determined two flaws in plaintiffs' argument:

> First, because there is no VRA in effect with Sweden, the Swedish producer may continue to export to the United States in whatever quantities it chooses. Second, the existence of the VRAs does not mean that the U.S. stainless steel industry is any less vulnerable to impact of dumped imports.

Views of Commissioners at 6-7 (footnote omitted).

Defendant argues that plaintiffs do not address the relevant issues at hand, namely the condition of the domestic industry and the effect of the subject imports on that industry. Defendant notes that "[f]or purposes of investigations under section 751(b), the ITC must assume that dumping will resume if the antidumping duty order is revoked or cancelled." *American Permac, Inc. v. United States*, 831 F.2d 269, 274 (Fed.Cir.1987), *cert. dismissed*, — U.S. —, 108 S.Ct. 1067, 99 L.Ed.2d 229 (1988). Defendant contends that plaintiffs have given no indication that they have eliminated the existing material injury or vulnerability to injury and have failed to show that the VRAs have changed the domestic industry or its vulnerability to material injury.

This Court agrees that plaintiffs have not shown any change in their effect on the domestic industry that could be attributed

to the VRAs. The fact that the United States chose to enter into agreements with several other steel producers does not lessen the danger of dumping by plaintiffs although arguably injury may be lessened. Defendant cites *Certain Welded Carbon Steel Pipes and Tubes From India, Taiwan, and Turkey*, USITC Pub. No. 1889 (1986), as an example of an instance where material injury was found when VRAs were in effect. Furthermore, arguing that other countries have entered into VRAs with the United States and that these agreements have benefitted the domestic industry seems to have little force in justifying giving relief to plaintiffs which have already been found to be engaged in dumping simply because Sweden has chosen not to enter into a similar VRA.

This Court finds that the Commission's determination that VRAs did not constitute changed circumstance sufficient to warrant investigation of a review determination was not arbitrary, capricious, or an abuse of discretion and was in accordance with law.

SWEDISH EXPORTS OF HOT- AND COLD-ROLLED STEEL TO EC

[7] Plaintiffs contend that Swedish exports of hot- and cold-rolled stainless steel plate to EC countries have increased by over 250 percent from 1971 to 1985 due to (1) the recovery from the recession of the early 1970s; (2) the elimination of tariffs and import quotas pursuant to the free-trade agreement between Sweden and the EC; and (3) the increase in the number of EC member-countries importing Swedish steel duty-free.

The Commissioners stated:

> Petitioners further allege, as they did in 1985, that the European market is a growing market for its plate exports. Although petitioners here rely on a different data series for this proposition from that on which they relied in 1985, their current data fail to take into account the change in E.C. membership since 1972. When that change is accounted for, Swedish shipments

> to the E.C. fell irregularly from 1973 to 1981 and then increased irregularly through 1985. In 1985, Swedish exports to the E.C. were just five percent higher than in 1972. Thus, the Commission again finds that there is no sufficient changed circumstance with regard to this allegation.

Views of Commissioners at 6.

Plaintiffs contend that their second review request contained a data series which presented exports of hot- and cold-rolled steel plate from Sweden to the EC from 1971 through the first nine months of 1986. This data series differs from the one provided in the first review request pertaining to *Avesta I*. Defendant argues that the data series from the second request did not have a constant base.

A review of the data series from the second request shows that prior to 1974, the data included imports by only West Germany, France, Italy, the Netherlands, Belgium and Luxembourg. In 1974 through 1980 the data included those six countries plus the United Kingdom, Ireland and Denmark. In 1981, the data included the above nine countries plus Greece and the 1986 data did not include Spain and Portugal. Petition for Review at 60 (Table 5).

Given the lack of a constant base, this Court finds that the Commission's determination that plaintiffs' sales to the E.C. did not constitute a changed circumstance sufficient to warrant review was not arbitrary, capricious, or an abuse of discretion and was in accordance with law.

COLD-ROLLED PLATE EXPORTED TO UNITED STATES

[8] Plaintiffs began exporting cold-rolled plate to the United States in 1986 and contend that exports of this merchandise to the EC are no longer irrelevant to the Commission's determination. In *Avesta I*, this Court noted that data regarding cold-rolled plate exports were irrelevant since plaintiffs were not exporting this merchandise to the United States at the time. *Avesta*

I 689 F.Supp. at 1186. Plaintiffs contend that the Commission should not rely on data which excluded cold-rolled plate.

Plaintiffs' contention here is an extension of the argument to have the ITC substitute plaintiffs' data series for the data used by the Commission. By plaintiffs' own admission, very little cold-rolled plate is sold in the United States market. Brief in Support of Plaintiffs' Motion for Judgment upon an Agency Record at 52 n. 89. While plaintiffs discussed the exporting of cold-rolled plate to the United States in its review request, the issue of missing data on cold-rolled plate was not introduced until post-argument briefs and this issue was placed in the context of showing the ITC's data to be unreliable. Introducing plaintiffs' data series, as explained *supra* would present an unrealistic picture of the steel plate market.

This Court finds that the ITC's determination that data excluding cold-rolled steel did not constitute a changed circumstance sufficient to warrant review was not arbitrary, capricious or an abuse of discretion and was in accordance with law.

EXCLUSION OF PATENTED PRODUCTS AND KBR PLATE

[9] In their review request, plaintiffs asked the Commission to institute an investigation to determine whether the finding of dumping should be modified to exclude future imports of two patented products and KBR plate. Plaintiffs contend that the Commissioners did not address their request and did not explain whether the request was considered for the purpose of modification of the antidumping order or as an issue in the possible revocation of the entire order.

The Commissioners stated:

> Simply because a new composition or size is produced – and even patented – does not make it sufficiently different in its characteristics and uses from other types of stainless steel plate to warrant a finding that there is no domestic like product. The Commission has regularly rejected arguments that specialty

> types of stainless steel should be treated differently from standard types in making like product determinations. In fact, in recently concluded investigation [sic], the Commission did not accept Avesta's argument that these two patented types of stainless steel are not competitive with domestically produced types of stainless steel.

Views of Commissioners at 5-6 (footnotes omitted).

Plaintiffs assert that since their two patented products were excluded from escape clause duties under 19 U.S.C. § 2251 (section 201 of the Trade Act of 1974) in 1981, these products were not competitive with United States plate. Plaintiffs also contend that in the 1987 investigation regarding escape clause duties, a majority of the Commissioners recommended termination of import relief for all of the plaintiffs' plate products.

Defendant responds that the test under section 201 is whether there is injury to a United States "industry producing an article like or directly competitive with the imported article" while, under the antidumping law, the Commission must determine whether there is injury to an industry producing an article that is "like, or in the absence of like, most similar in characteristics and uses with" the imported product. 19 U.S.C. §§ 2251(b)(1) and 1677(10) (1982). Defendant argues, therefore, that being exempt from section 201 duties does not mean that plaintiffs' merchandise does not compete with domestic plate nor does it mean that plaintiffs' merchandise is not injurious to the domestic industry.

Although plaintiffs never made a formal request, their argument could best be described as proposing that the two patented products plus KBR plate are separate like products from standard stainless steel plate. Plaintiffs contend that KBR is the only continuously made cold-rolled stainless steel plate in widths of sixty inches or more. KBR is eighty inch wide plate. Defendant replies that there is a seventy-two inch wide plate which is comparable to KBR. Defendant also contends that simply patenting merchandise does not make it different in a commercial sense.

The ITC has continuously held that merchandise generally sharing the same characteristics and uses are like products. In *Certain Flat-Rolled Carbon Steel Products From Brazil*, USITC Pub. No. 1499 at 6 (1984) the Commission held that coiled steel plate and cut-to-length steel plate constituted carbon steel plate, a like product because all have essentially the same characteristics, uses, metallurgical composition, are virtually interchangeable and have almost identical end uses. In the instant case, plaintiffs did not convince the ITC that their three products possessed qualities which would make them a separate like product. Defendant contends that KBR is interchangeable with the seventy-two inch plate. Plaintiffs argue that KBR has unique properties such as a more shiny surface finish, closer dimensional tolerance, more uniform mechanical properties, and greater width, but does not argue that end uses or metallurgical composition differs from standard plate. The Commissioners noted that "plate may be produced in an almost infinite variety of compositions and sizes, depending upon the components chosen, the ratios in which they are used, and the individual production machinery and steps employed." Views of Commissioners at 5.

This Court holds that the Commission's determination that KBR and the two patented products do not constitute a separate like product was not arbitrary, capricious or an abuse of discretion and was in accordance with law.

CORPORATE CONSOLIDATION IN SWEDEN

[10] Plaintiffs argue that the shrinking of the stainless steel plate industry from four producers in 1972 to one single producer, plaintiffs, in 1987 and the consistently shrinking capacity to produce stainless steel products constitutes a changed circumstance. The Commission noted that:

> petitioners allege, as they did in 1985, that there has been a restructuring of the Swedish stainless steel industry after 1972, in which the number of Swedish producers had declined from four to one. They also

> allege, as they did in 1985, that there was a decrease in the number of steel mills during the same period. In 1985, the Commission found these allegations insufficient. It is currently alleged, *inter alia*, that since 1984, capacity to produce hot-rolled plate has declined. However, notwithstanding the decreases in absolute capacity, there remains sufficient unusued productive capacity to significantly increase exports to the United States without decreasing production for the Swedish market or for other export markets.

Views of Commissioners at 7.

Plaintiffs contend that the Commissioners ignored the significance of the corporate consolidations and claim that the existence of unusued capacity is only one of many factors which should have been weighed against other factors in the full investigation such as plaintiffs' overall reduction in production capacity which would decrease the likelihood of injury to the domestic industry if the antidumping order were revoked. Plaintiffs add that their decision to supply the United States market with plate from the Indiana mill and their intent to maintain *de minimis* imports show that they do not intend to import plate at injurious levels should the antidumping order be revoked.

Defendant argues that while there was a decrease in plaintiffs' production from 1984 to 1986, if business conditions were favorable, production could be restored to 1984 levels. Defendant dismisses plaintiffs' argument that labor costs would prohibit such a production increase since defendant contends there was no indication of any shift in labor or other production cost from 1984 to 1986 that would make the 1984 production levels less achievable based on cost. Defendant argues further that even slight increases in capacity utilization could result in large increases in export volume.

Plaintiffs claim they have made changes which would indicate their intent not to import at injurious levels. In reality their ability to increase imports still exists even though they are now the sole

producer of stainless steel in Sweden. This Court finds the Commission's decision that restructuring of the Swedish stainless steel industry did not constitute a changed circumstance sufficient to warrant review was not arbitrary, capricious or an abuse of discretion and was in accordance with law.

CONCLUSION

For the reasons provided above, this Court holds that the Commission's determination regarding plaintiffs' petition for review of the 1973 finding of dumping of stainless steel plate from Sweden was not arbitrary, capricious or an abuse of discretion and was in accordance with law. Accordingly, plaintiffs' motion is denied and the determination is sustained.

JUDGMENT

Upon reading and considering plaintiffs' motion for judgment upon an agency record regarding the determination of the ITC not to institute an investigation under section 751(b) of the Tariff Act of 1930 to determine whether an industry in the United States would be materially injured, threatened with material injury or whether the establishment of an industry in the United States would be materially retarded by reason of dumped imports of stainless steel plate from Sweden if the outstanding antidumping order on that merchandise, T.D. 73-157, were modified or revoked, and upon reading and considering all opposition thereto, it is hereby

ORDERED that the determination is affirmed in all respects; and it is further

ORDERED that plaintiffs' motion is denied; and it is further

ORDERED that this action is hereby dismissed.

Federal Register/Vol. 52, No. 126/Wednesday, July 1, 1987/Notices
52 Fed. Reg. 24541

Stainless Steel Plate From Sweden

AGENCY: International Trade Commission

ACTION: Dismissal of a request to institute a section 751(b) review investigation concerning the Commission's affirmative determination in investigation No. AA1921-114, stainless steel plate from Sweden.

SUMMARY: The Commission determines pursuant to section 751(b) of the Tariff Act of 1930 (19 U.S.C. 1675(b)) and rule 207.45 of the Commission's rules (19 CFR 207.45), that the petition does not show changed circumstances sufficient to warrant institution of an investigation to review the Commission's affirmative determination in investigation No. AA1921-114 regarding stainless steel plate from Sweden provided for in items 607.76 and 607.90 of the Tariff Schedules of the United States.

FOR FURTHER INFORMATION CONTACT: Lawrence Rausch (202-523-0300), Office of Investigations, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

SUPPLEMENTARY INFORMATION:

Background

On May 1, 1973, the Commission determined that an industry in the United States was injured within the meaning of the Antidumping Act of 1921 by reason of imports of stainless steel plate from Sweden which the Secretary of Treasury had determined to be sold or likely to be sold at less than fair value (LTFV). On June 5, 1973, the Department of Treasury issued a finding of dumping (T.D. 73-157) and published a notice of such a finding in the Federal Register (38 FR 15079).

On July 8, 1985, the Commission received a request to review its affirmative determination in investigation No. AA1921-114.

The request was filed pursuant to section 751(b) of the Tariff Act of 1930 by counsel on behalf of Avesta AB, the sole Swedish producer and exporter of stainless steel plate, and its affiliated company, Avesta Stainless Inc., a U.S. producer of stainless steel plate. The Commission published a notice in the Federal Register requesting comments as to whether the alleged changed circumstances were sufficient to warrant institution of a review investigation. Comments were supplied by counsel on behalf of Allegheny Ludlum Steel Corp., Armco Inc., LTV Steel Co., Washington Steel Corp., and the United Steelworkers of America opposing the institution of a review investigation. After review of the petition and the responses to the notice inviting comments, the Commission determined that the petition did not show changed circumstances sufficient to warrant institution of a review investigation (50 FR 43613).

On February 25, 1987, the Commission received a second request, pursuant to section 751(b) of the Act, to review its affirmative determination in investigation No. AA1921-114. This request was again filed by counsel on behalf of Avesta AB, the sole Swedish producer the exporter of stainless steel plate, and its affiliated company, Avesta Stainless Inc., a U.S. producer of stainless steel plate. On March 25, 1987, the Commission requested written comments in the Federal Register (52 FR 9551) as to whether the changed circumstances alleged by the petitioner were sufficient to warrant a review investigation. Comments were supplied by counsel on behalf of Allegheny Ludlum Steel Corp., Armco Inc., LTV Steel Co., Washington Steel Corp., and the United Steelworkers of America opposing the institution of a review investigation and by counsel on behalf of the petitioner supporting the institution of a review investigation.

After review of the petition for review and the responses to the notice inviting comments, the Commission has determined (Chairman Liebler and Vice Chairman Brunsdale dissenting), pursuant to 19 U.S.C. 1675(b) and rule 19 CFR 207.45, that the petition does not show changed circumstances sufficient to warrant institution of a review investigation regarding stainless steel plate from Seden [sic]. A Memorandum Opinion, setting forth

the reasons for dismissing this request will be made available in the Secretary's office.

Issued: June 26, 1987.

By order of the Commission.

Kenneth R. Mason.

Secretary

(FR Doc 87-14970 Filed 6-30-87; 8:45 am)

BILLING CODE 7029-02-M

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In re Docket No. 1380

Request for conduct of a review investigation under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b), relating to stainless steel plate from Sweden.

VIEWS OF COMMISSIONERS ALFRED ECKES, SEELEY LODWICK, AND DAVID ROHR

Background

On May 1, 1973, the U.S. Tariff Commission (predecessor to this Commission) determined that an industry in the United States was injured within the meaning of the Antidumping Act, 1921, by reason of imports of stainless steel plate from Sweden which the Secretary of the Treasury had determined to be sold or likely to be sold at less than fair value. On June 5, 1973, the Department of the Treasury issued a finding of dumping and published notice thereof in the *Federal Register*.[1]

On February 24, 1987, the Commission received a request to conduct an investigation under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b), on behalf of Avesta AB, the sole Swedish producer and exporter of stainless steel plate, and Avesta Stainless, Inc., an affiliated U.S. producer of stainless steel plate.[2] The petition alleged that there are eight changed circumstances:

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[1] 38 Fed. Reg. 15079.

[2] This is not the first time that the Commission has received a petition regarding stainless steel plate from Sweden. On July 8, 1985, the Commission received a request for a review investigation from the same parties. The Commission determined (Chairwoman Stern and Vice Chairman Liebeler dissenting) that the petition did not show changed circumstances sufficient to warrant institution of a review investigation. 50 Fed. Reg. 43613 (Oct. 28, 1985). That determination has been appealed by the petitioners. Avesta AB v. United States, U.S. Court of International Trade No. 85-10-1497.

1. The number of producers in Sweden has declined from four in 1972 to a single producer in 1987 and Sweden's capacity to produce stainless steel plate has declined;

2. Imports of hot-rolled stainless steel plate from Sweden have been and remain at *de minimis* levels;

3. The *de minimis* levels of imports from Sweden result from the 1976 acquisition by Avesta of a hot-rolling plate producing mill in the United States;

4. In contrast to the early 1970s, the European Community (EC) is a growing market for Swedish plate and Swedish plate enters the EC without quantitive restrictions and duty-free;

5. U.S. producers are highly protected due to the negotiation and implementation of "voluntary restraint agreements" (VRAs) with those countries whose producers are the major foreign supplier to the United States market;

6. Sweden has not entered into a VRA with the U.S. and its exports to the U.S. remain subject to antidumping and countervailing duties, while those from the VRA countries are not;

7. Sweden supplies U.S. demand for cold-rolled plate of widths which U.S. firms are unable to supply; and

8. Several patented types of stainless steel plate that did not exist in the 1970s and that are not produced in the U.S. are being exported from Sweden to the U.S.

The Commission published notice of the petition and requested public comments thereon.[3]

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[3] 52 Fed. Reg. 9552 (March 25, 1987).

After considering the petition, the Commission determined[4] that the petition did not show changed circumstances sufficient to warrant institution of a review investigation.[5] This memorandum states the reasons for that determination.

Discussion

Having considered the petition for institution of an investigation and the comments received, the Commission has determined that the petition does not show changed circumstances sufficient to warrant an investigaiton. Although we discuss the allegations individually, our determination is based on an examination of the petition as a whole.

Petitioners allege that imports of stainless steel plate (plate) from Sweden have been and remain at *de minimis* levels, asserting that this constitutes a changed circumstance supporting their request for a review investigation. The Commission found this same allegation unpersuasive when raised in 1985. As we noted there, U.S. imports of Swedish plate declined sharply in 1974, the year following the imposition of the antidumping order, and, although fluctuating from year to year, they remained relatively constant thereafter. A decline in exports is an expected result from the imposition of an order. Moreover, plate imports, including those from Sweden, have been subject to quotas and additional duties during portions of the years since 1973 including, for example, special duties imposed pursuant to section 202 of the Trade Act of 1974.[6] The current allegation is not in any significant respect different from the allegation rejected by the Commission in 1985. The Commission again finds that petitioners have offered no legally sufficient reason why the current levels of plate imports are the result of anything other than import relief.

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[4] Chairman Liebeler and Vice Chairman Brunsdale dissent from this determination.

[5] 19 U.S.C. § 1675(b); 19 CFR § 207.45(a)(1)(i).

[6] 19 U.S.C. § 2252.

Petitioners allege, as they did in 1985, that the decline in the volume of imports is the result of the 1976 acquisition of a stainless steel facility in New Castle, Indiana, formerly owned by the Ingersoll Div., Borg-Warner Corp. However, the volume of imports of Swedish plate declined sharply in 1974. As we found in 1985, the level of imports from Sweden has not decreased since that purchase. In fact, current data show notable increases in the most recent periods. Unlike their 1985 petition, petitioners now assert that acquisition of the mill caused a substantial shift in their market strategy and that the New Castle mill is used to supply the majority of petitioners' hot-rolled plate for the U.S. market. They state that they intend to use the U.S. facility for hot-rolled plate except for specialty types. Their data, however, show that exports of Swedish plate to the U.S. are predominantly hot-rolled, including a very substantial percentage of standard types. We conclude that that [sic] the Swedish producers have offered no additional argument to support their assertion that exporters have significantly altered their long-term practices with regard to exports of plate to the United States.

Petitioners have also argued that they now predominantly export specialty types of stainless steel plate that are not produced in the United States. These are two patented types of plate (identified as "253 MA" and "254 SMO") and KBR plate, a continuously-made cold-rolled plate in 80-inch width. However, the data show that the two patented types of plate are being imported in only small quantities and, as noted above, Avesta continues to export very significant quantities of standard types of hot-rolled plate to the United States. KBR sales have occurred in a very limited market, with only minimal possibilities for further sales. In fact, although there is no domestic production of continuously-made cold-rolled plate in 80-inch width, and there is piece-by-piece production of plate up to 72-inch width. Moreover, plate may be produced in an almost infinite variety of compositions and sizes, depending on the components chosen, the ratios in which they are used, and the individual production machinery and steps employed. Simply because a new composition or size is produced – and even patented – does not make it sufficiently different in its characteristics and

uses from other types of stainless steel plate to warrant a finding that there is no domestic like product.[7] The Comission has regularly rejected arguments that specialty types of stainless steel should be treated differently from standard types in making like product determinations.[8] In fact, in recently concluded investigation, the Commission did not accept Avesta's argument that these two patented types of stainless steel are not competitive with domestically produced types of stainless steel.[9]

Petitioners further allege, as they did in 1985, that the European market is a growing market for its plate exports. Although petitioners here rely on a different data series for this proposition from that on which they relied in 1985, their current data fail to take into account the change in E.C. membership since 1972. When that change is accounted for, Swedish shipments to the E.C. fell irregularly from 1973 to 1981 and then increased irregularly through 1985. In 1985, Swedish exports to the E.C. were just five percent higher than in 1972. Thus, the Commission again finds that there is no sufficient changed circumstance with regard to this allegation.

Petitioners allege that the U.S. producers of stainless plate are highly protected due to the negotiation and implementation of voluntary restraint agreements (VRAs) with a variety of countries, though not with Sweden. As petitioners correctly note, those VRAs, *inter alia*, limit exports of stainless steel plate to the U.S. and eliminate exposure to U.S. antidumping and countervailing duties for those exports. There are two flaws in the argument. First, because there is no VRA in effect with Sweden, the Swedish producer may continue to export to the United States in whatever quantities it chooses. Second, the existence of the VRAs does not mean that the U.S. stainless steel industry is any less vulnerable to the impact of dumped imports.[10]

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[7] 19 U.S.C. § 1677(10) (1982).

[8] *Compare* 49 Fed. Reg. 4045 (Feb. 1, 1984) (Acrylic Sheet from Japan).

[9] *Stainless Steel and Alloy Tool Steel*, Inv. No. TA-203-16, USITC Pub. 1975 (May 1987).

[10] *See Stainless Steel and Alloy Tool Steel, supra*.

Finally, petitioners allege, as they did in 1985, that there has been a restructuring of the Swedish stainless steel industry after 1972, in which the number of Swedish producers had declined from four to one. They also allege, as they did in 1985, that there was a decrease in the number of steel mills during the same period. In 1985, the Commission found these allegations insufficient. It is currently alleged, *inter alia*, that since 1984, capacity to produce hot-rolled plate has declined. However, notwithstanding the decreases in absolute capacity, there remains sufficient unused productive capacity to significantly increase exports to the United States without decreasing production for the Swedish market or for other export markets.

Accordingly, considered as a whole, the petition does not show changed circumstances sufficient to warrant institution of a review investigation.

APPENDIX F

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In re Docket No. 1380

Request for conduct of a review investigation under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b), relating to stainless steel plate from Sweden.

VIEWS OF CHAIRMAN SUSAN LIEBELER AND VICE CHAIRMAN ANNE BRUNSDALE

We believe that the subject request alleges changed circumstances, particularly the purchase by a Swedish producer of a U.S. stainless steel plate production facility, sufficient to warrant institution of a review investigation. Therefore, we dissent from the decision by the Commission to deny institution.

APPENDIX G

RULES AND REGULATIONS

Title 19—Customs Duties

CHAPTER I—BUREAU OF CUSTOMS, DEPARTMENT OF THE TREASURY

[T.D. 73-157]

PART 153—ANTIDUMPING

Stainless Steel Plate From Sweden

June 5, 1973.

Section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), gives the Secretary of the Treasury responsibility for determination of sales at less than fair value. Pursuant to this authority the Secretary of the Treasury has determined that stainless steel plate from Sweden is being, or is likely to be, sold at less than fair value within the meaning of section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)). (Published in the FEDERAL REGISTER of Feb. 2, 1973 (38 FR 3204, FR Doc. 73-2134).)

Section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), gives the U.S. Tariff Commission responsibility for determination of injury or likelihood of injury. The U.S. Tariff Commission has determined, and on May 1, 1973, it notified the Secretary of the Treasury that an industry in the United States is being injured by reason of the importation of stainless steel plate from Sweden sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended. (Published in the FEDERAL REGISTER of May 7, 1973 (38 FR 11381, FR Doc. 73-8920).)

On behalf of the Secretary of the Treasury, I hereby make public these determinations, which constitute a finding of dumping with respect to stainless steel plate from Sweden.

Shipments of stainless steel plate produced by Stora Kopparbergs Bergslags AB, Falun, Sweden, are excluded from this finding of dumping since 100 percent of Swedish export sales during the period under consideration were examined and, subsequent to the publication of the "Determination of Sales at Less Than Fair Value" it was determined that the home market prices of Stora Kopparbergs' merchandise were lower than the exporter's sales price of such or similar merchandise in every instance.

Section 153.43 of the "Customs Regulations" is amended by adding the following to the list of findings of dumping currently in effect:

Merchandise	Country	T.D.
Stainless steel plate, except shipments by Stora Kopparbergs Bergslags AB, Falun, Sweden.	Sweden . . .	73-157

(Secs. 201, 407, 42 Stat. 11, as amended, 18; 19 U.S.C. 160, 173.)

[SEAL] EDWARD L. MORGAN,

Assistant Secretary of the Treasury.

[FR Doc. 73-11571 Filed 6-7-73; 8:45 am]

APPENDIX H

UNITED STATES TARIFF COMMISSION

STAINLESS STEEL PLATE FROM SWEDEN

Determination of Injury
in Investigation No. AA1921-114
Under the Antidumping Act, 1921, as Amended

TC Publication 573
Washington, D.C.
May 1973

UNITED STATES TARIFF COMMISSION
Washington

[AA1921-114]

May 1, 1973

STAINLESS-STEEL PLATE FROM SWEDEN

Determination of Injury

The Treasury Department advised the Tariff Commission on February 1, 1973, that stainless-steel plate from Sweden is being, or is likely to be, sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended. In accordance with the requirements of section 201(a) of the Antidumping Act (19 U.S.C. 160(a)), the Tariff Commission instituted investigation No. AA1921-114 to determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

A public hearing was held March 27-29, 1973. Notice of the investigation and hearing was published in the *Federal Register* of February 16, 1973 (30 F.R. 4599).

In arriving at a determination in this case, the Commission gave due consideration to all written submissions from interested parties, evidence adduced at the hearing, and all factual information obtained by the Commission's staff from questionnaires, personal interviews, and other sources.

On the basis of the investigation, the Commission[1] has determined that an industry in the United States is being injured by reason of the importation of stainless-steel plate from Sweden being sold at less than fair value.

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[1] Vice Chairman Parker and Commissioners Leonard and Young did not participate in the decision.

STATEMENT OF REASONS

The Antidumping Act, 1921, as amended, requires that the Tariff Commission find two conditions satisfied before an affirmative determination can be made.

First, there must be injury, or likelihood of injury, to an industry in the United States, or an industry in the United States must be prevented from being established. Second, such injury, likelihood of injury, or prevention of establishment of an industry, must be by reason of the importation into the United States of the class or kind of foreign merchandise the Secretary of the Treasury has determined is being, or is likely to be, sold at less than fair value (LTFV).

The aforementioned conditions are satisfied in the instant case. In our judgment an industry[1] in the United States is being injured by reason of imports of stainless-steel plate from Sweden sold at less than fair value. Our determination is based primarily on the following evaluation of facts developed during the investigation.

The Treasury Department found from its investigation that the bulk of the exports of stainless-steel plate from Sweden to the United States is being sold at less than fair value, and that the margins of dumping, i.e., the difference between fair value and the LTFV sales prices, are substantial.

Prices paid by distributors for LTFV imports are substantially lower than those paid for domestically produced stainless-steel plate, and the difference in price is approximately equal to the average LTFV margin found by the Treasury Department. Many distributors state that they would not purchase stainless-steel plate from any foreign source unless it was priced substantially below the price paid for U.S.-produced stainless-steel plate. Were

---

[1] We have determined that the domestic industry being injured by LTFV imports herein considered consists of the facilities of domestic producers engaged in the production of stainless-steel plate.

the Swedish producers to sell at fair value the prices of imports from Sweden and of the domestic articles would be comparable, and domestic sales of imports from Sweden would be reduced. If such imports had been sold at fair value the sharp increase in imports and in U.S. market penetration by LTFV imports would never have occurred.

By reason of the LTFV sales on the part of the Swedish exporters, U.S. producers' prices have failed to increase in proportion to increased costs of domestic production. For example, the average net sales price per ton of domestically produced stainless-steel plate actually declined by 4.5 percent between 1970 and 1972, while the average hourly earnings per worker in primary metals industries, of which the stainless-steel plate industry is a part, increased by 18.2 percent. Other costs of production have also increased, thus resulting in a severe profit squeeze for the U.S. producers, caused – at least in part – by their inability to raise prices sufficiently to meet competition from LTFV imports of stainless-steel plate from Sweden.

Notwithstanding greatly increased exports to the U.S. market, such export sales continued in 1971 and 1972 to account for a small proportion of Sweden's total exports of such merchandise. In 1971, exports of stainless-steel plate and sheet to the United States accounted for only 10 percent of Sweden's total exports of such merchandise, exports to Western Europe accounted for 67 percent, and exports to all other countries accounted for 23 percent. There is considerable room for expansion of exports to the United States not only by altering market priorities but also by increasing production.

Swedish producers of stainless-steel plate, despite sales at less than fair value, are able to achieve a higher net return on their sales in the United States than on their sales in any other market. Thus, the Swedish producers have the capacity to increase their exports to the United States and the higher profitability for them from their sales to the United States at less than fair value is likely to encourage them to do so.

Imports of stainless-steel plate from Sweden have increased sharply in the past several years. In 1970, U.S. imports of

stainless-steel plate from Sweden amounted to 1,600 net tons, or 19 percent of total imports, but in 1972 they amounted to nearly 10,000 net tons or 58 percent of total imports. Imports from Sweden alone in 1972 were almost equal to imports from all sources in 1971 and were greater than imports from all sources in any previous year.

One of the principal reasons for increased Swedish concentration on the U.S. market was the decline in demand for stainless-steel plate and sheet in Sweden's largest market, Western Europe. From available international statistical records, Swedish exports of stainless-steel plate and sheet during the period 1968-71 increased annually, from 90,000 metric tons in 1968 to 94,000 metric tons in 1971. However, exports to Western Europe fell off by 12,000 metric tons in 1971, while exports to the United States increased sharply. With the loss of its Western European market, Sweden maintained its total export level in 1971 by increasing its exports to the United States and to other markets outside of Western Europe.

In 1970, imports of stainless-steel plate from Sweden amounted to only 2 percent of apparent U.S. consumption. In 1971, however, they amounted to more than 5 percent, and by 1972, when Treasury found LTFV sales, they amounted to nearly 12 percent of the domestic market.

There is clear relation between lost sales by U.S. producers and LTFV imports of stainless-steel plate from Sweden. The Commission contacted distributors accounting for over 80 percent of total U.S. sales of stainless-steel plate. Over 75 percent of these distributors stated that they were buying or had bought stainless-steel plate imported from Sweden since January 1, 1972. Such LTFV sales supplanted purchases that would otherwise have been made from U.S. producers. This is supported by the fact that U.S. producers' shipments were 3 percent smaller in 1972 than in 1970, whereas U.S. consumption was 9 percent greater.

A review of the accounting procedures and financial statements of the principal producers of stainless-steel plate finds

an overall decline in profits and returns on investment. Net operating profits for those firms as a percentage of net sales declined from 7 percent in 1968 and 1969 to 4 percent in 1972. For their stainless-steel plate operations alone, net operating profit as a percentage of net sales of stainless-steel plate declined even more precipitously, from 4.4 percent in 1968 to 1.5 percent in 1972. Although some of the decline in profitability of these producers may have been due to recessionary factors in 1970 and 1971, the continued low level of profits in 1972 is directly attributable to increased production costs coupled with LTFV sales of Swedish stainless-steel plate that have held domestic prices at abnormally low levels.

On the basis of the foregoing, we conclude that an industry in the United States is being injured by reason of imports of stainless-steel plate from Sweden sold at less than fair value.

APPENDIX I

STATUTES INVOLVED

Section 751(b)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(b)(1), provides, in pertinent part:

> Whenever . . . the Commission receives information concerning, or a request for the review of . . . an affirmative [dumping injury] determination made under section 1673d(b) . . . of this title, which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register * * *.
>
> During an investigation by the Commission, the party seeking revocation of an antidumping . . . duty order shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant revocation of the antidumping duty order.

Section 516A(a)(1)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(1)(B), provides:

> Within 30 days after the date of publication in the Federal Register of —
>
> * * *
>
> (B) a determination by the Commission, under section 1675(b) of this title, not to review a determination based upon changed circumstances,
>
> * * *
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and

> complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

Section 516A(a)(2)(A)(i) of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(A)(i)(I), provides:

> Within thirty days after –
>
> (i) the date of publication in the Federal Register of –
>
> (I) notice of any determination described in clause (ii) . . . of subparagraph (B),
>
> * * *
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(B)(iii), provides:

> The determinations which may be contested under subparagraph (A) are as follows:
>
> (iii) A final determination, other than a determination reviewable under paragraph (1), by . . . the Commission under section 1675 of this title.
>
> * * *

Sections 516A(b)(1) of the Tariff Act of 1930, 19 U.S.C. § 1516a(b)(1), provides:

The court shall hold unlawful any determination, finding, or conclusion found –

(A) in an action brought under paragraph (1) of subsection (a) of this section, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or

(B) in an action brought under paragraph (2) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

(2)

No. 90-971

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1990

AVESTA AB and AVESTA STAINLESS, INC.,

Petitioners,

v.

THE UNITED STATES, ALLEGHENY LUDLUM STEEL CORPORATION, ARMCO INC., JESSOP STEEL CORPORATION, J&L SPECIALTY PRODUCTS COMPANY, WASHINGTON STEEL CORPORATION, AND THE UNITED STEELWORKERS OF AMERICA (AFL-CIO/CLC),

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION BY RESPONDENTS ALLEGHENY LUDLUM STEEL CORPORATION, ARMCO INC., JESSOP STEEL CORPORATION, J&L SPECIALTY PRODUCTS COMPANY, WASHINGTON STEEL CORPORATION, AND THE UNITED STEELWORKERS OF AMERICA (AFL-CIO/CLC)

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QUESTIONS PRESENTED

1. Whether the United States International Trade Commission, as affirmed by the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit, concluded in accordance with law that the petitioners had not shown changed circumstances sufficient to warrant a review of an earlier, affirmative determination by the United States Tariff Commission that dumped imports of stainless steel plate from Sweden were injuring the United States domestic industry engaged in the production of stainless steel plate.

2. Whether the United States International Trade Commission, having thoroughly studied the petitioners' allegations of changed circumstances and evidence submitted by the United States domestic industry, abused its discretion or acted arbitrarily or capriciously by resolving in a reasoned, clearly explained decision that the petitioners had not demonstrated changed circumstances sufficient to warrant the requested review.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

A. The 1973 Swedish Plate Finding of Dumping 2

B. The 1985 Petition For A Changed Circumstances Review 3

C. The 1987 Petition For A Changed Circumstances Review 6

SUMMARY OF THE ARGUMENT WHY THE WRIT SHOULD BE DENIED 8

ARGUMENT 10

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE GOVERNING LEGAL STANDARD ESTABLISHED BY CONGRESS WAS FAITHFULLY APPLIED BY THE INTERNATIONAL TRADE COMMISSION AND PROPERLY AFFIRMED BY THE COURT OF APPEALS IN REJECTING THE PETITIONERS' REQUEST FOR A CHANGED CIRCUMSTANCES REVIEW 10

II. THE DETERMINATION AGAINST REVIEW OF THE SWEDISH PLATE DUMPING FINDING IS JUSTIFIED ON THE MERITS, SO THAT A WRIT OF CERTIORARI IS UNCALLED FOR AND INAPPROPRIATE 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

American Permac, Inc. v. United States, 831 F.2d 269 (Fed. Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988) 16

Avesta AB v. United States, 12 CIT ___, 689 F. Supp. 1173 (1988) ..... *passim*

Matsushita Electric Industrial Co., Ltd. v. United States, 750 F.2d 927, 3 Fed. Cir. (T) 44 (1984) 16

United States v. Johnston, 268 U.S. 220 (1925) 18

RULES

Supreme Court Rule 29.1 2

STATUTES AND REGULATIONS

Antidumping Act of 1921 (19 U.S.C. §§ 160 *et seq.* (1921)) 2, 11, 13

Customs Simplification Act of 1954, Pub. L. No. 83-768, 68 Stat. 1136 (1954) 11

Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) 14

Tariff Act of 1930, Title VII, 19 U.S.C. §§ 1671 *et seq.* 3, 4, 7, 13

§§ 516A(a)(i)(B) and (b)(1)(A), 19 U.S.C. §§ 1516a(a)(1)(B) and (b)(1)(A) (1982 & Supp. V 1987) 7

§ 751(b)(1), 19 U.S.C. § 1675(b)(1) (1982 & Supp. V 1987) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Trade Agreements Act of 1979, Pub. L. No. 96-39, Title I, 93 Stat. 144 (1979) 2, 13

Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984) 14, 15

19 C.F.R. § 207.45 (1982) 14

19 C.F.R. § 207.5(c) (1978) 12

CONGRESSIONAL REPORTS

H. Conf. Rep. No. 1156, 98th Cong., 2d Sess. (1984) 16

H.R. Rep. No. 317, 96th Cong., 1st Sess. (1979) 14

S. Rep. No. 249, 96th Cong., 1st Sess. (1979) 14

S. Rep. No. 1298, 93d Cong., 2d Sess. (1974) 12

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ADMINISTRATIVE DETERMINATIONS

Birch Three-Ply Door Skins from Japan, Inv. No. 751-TA-6, USITC Pub. 1271 (July 1982) 14

Northern Bleached Hardwood Kraft Pulp from Canada, Inv. No. AA-105A, USITC Pub. 687 (Sept. 1974) 11

Primary Lead Metal from Australia and Canada, Inv. Nos. AA 1921-134A and 135A, USITC Pub 772 (April 1976) 11

Salmon Gill Fish Netting of Manmade Fibers from Japan, Inv. No. 751-TA-5, USITC Pub. 1234 (March 1982) 14

TABLE OF AUTHORITIES – Continued

Page

49 Fed. Reg. 39,885 (Oct. 11, 1984) 17

50 Fed. Reg. 43,613 (Oct. 28, 1985) 4, 5

55 Fed. Reg. 36,680 (Sept. 6, 1990) 17

MISCELLANEOUS

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *opened for signature*, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 (entered into force Jan. 1, 1980) 9, 13-15

No. 90-971

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The respondents Allegheny Ludlum Steel Corporation, Armco Inc., Jessop Steel Corporation, J&L Specialty Products Company, Washington Steel Corporation, and

The United Steelworkers of America (AFL-CIO/CLC) respectfully request that this Court deny the petition for a writ of certiorari to review the opinion by the Court of Appeals for the Federal Circuit in this case.[1] That opinion is reported at 914 F.2d 233.

STATEMENT OF THE CASE

A. The 1973 Swedish Plate Finding of Dumping

On May 1, 1973, the United States Tariff Commission (subsequently renamed the United States International Trade Commission) ("Commission") determined that an industry in the United States was being injured within the meaning of the Antidumping Act of 1921 (19 U.S.C. §§ 160 *et seq.* (1921)), *repealed by* the Trade Agreements Act of 1979, Pub. L. No. 96-39, Title I, 93 Stat. 144 (1979), by reason of imports of stainless steel plate from Sweden that the Secretary of the Treasury had advised the Commission were being, or were likely to be, sold at less than fair value (Pet. App. 43a-48a).

In its determination, the Commission documented a sharp increase in imports of stainless steel plate from Sweden between 1970 and 1972, both in absolute volumes and as a percentage of apparent United States consumption, and noted that the dumped Swedish sales had prevented United States producers' prices from increasing in

[1] Jessop Steel Corporation is a subsidiary of Aphlone Industries, Inc. The respondents have no other parent or subsidiary companies to list in accordance with Rule 29.1 of this Court.

proportion to increased costs of domestic production. The Commission also observed that, despite the greatly increased Swedish exports to the United States, there was considerable room for the expansion of these exports through alteration of market priorities and increased production. In this connection, the Commission stated that a principal reason for increased Swedish concentration on the United States market was a decline in demand for stainless steel plate from Western Europe, Sweden's largest market. After finding a clear relation between sales lost by United States producers and the imports at less than fair value from Sweden, the Commission cited an over-all decline in the major United States producers' profits and returns on investment and attributed the continued low level of profits during 1972 to rising production costs coupled with abnormally low domestic prices caused by the dumped sales of Swedish stainless steel plate (Pet. App. 45a-48a).

As the result of the affirmative determinations of sales at less than fair value and injury, the Secretary of the Treasury issued a finding of dumping with respect to stainless steel plate from Sweden on June 5, 1973 (Pet. App. 41a-42a). This finding has continued in effect to the present.

B. The 1985 Petition For A Changed Circumstances Review

On July 8, 1985, the petitioners filed their first request with the Commission for a review of the 1973 finding under section 751(b)(1) of the Tariff Act of 1930,

as amended (19 U.S.C. § 1675(b)(1) (1982)). The Commission determined that the petitioners had not established changed circumstances sufficient to warrant a review (50 Fed. Reg. 43,613 (Oct. 28, 1985)), and on appeal by the petitioners the United States Court of International Trade sustained the Commission's determination. *Avesta AB v. United States*, 12 CIT ___, 689 F. Supp. 1173 (1988) (hereinafter *Avesta I*). The petitioners did not appeal *Avesta I* further to the United States Court of Appeals.

In denying the petitioners a review in *Avesta I*, the Commission addressed in turn and rejected each of the alleged changed circumstances raised by the petitioners. First, the petitioners' purchase of a plate mill in Indiana during 1976 was deemed an inadequate basis for review, primarily because imports of stainless steel plate from Sweden were found to have increased between 1983 and 1984 and not to have been deemphasized, as asserted by the petitioners, under an alternative marketing strategy of direct investment in the United States. Second, in response to the petitioners' argument that the imports from Sweden were *de minimis* and commercially insignificant, the Commission concluded that the petitioners had offered no persuasive reason why the drop in volume was the result of anything other than the intended import relief. Third, as to the consolidation of the stainless steel plate industry in Sweden from four producers with four mills in 1972 to one producer with two mills in 1985, the Commission found that the consolidation would not necessarily lead to a decline in exports to the United States. Fourth, the petitioners' calculations of an asserted increase in Swedish exports of stainless steel plate to Western Europe were discovered by the Commission to

be seriously skewed; the Commission found instead that these exports during the early 1980's were actually below the levels of the early 1970's. 50 Fed. Reg. at 43,614.

In *Avesta I*, the Court of International Trade upheld the Commission, holding that the Commission's decision was not arbitrary, capricious, or an abuse of discretion and was otherwise in accordance with law. In addition to affirming the Commission's reasoning in rejecting the petitioners' alleged changed circumstances, the court addressed the legal standard applicable in a preliminary changed circumstances determination and the petitioners' contention that the Commission should have conducted a hearing before deciding the issue of whether there were changed circumstances sufficient to warrant a review.

With respect to the governing legal standard, the court examined the history and regulatory framework behind 19 U.S.C. § 1675(b)(1) and relevant judicial precedent. The court concluded that Congress intended the review process to be undertaken by the Commission on a case-by-case basis, with reviews to be conducted by the Commission after it had weighed conflicting as well as affirmative evidence and only when it reasonably appeared from positive evidence that there were changed circumstances sufficient to warrant a review. 12 CIT ___, 689 F. Supp. at 1178-1181.

With regard to whether a hearing was mandated at this preliminary stage of the changed circumstances inquiry, the court held the Commission's procedure of notice and comment to be adequate. The court observed that no requirement for a hearing is expressly stated or can fairly be implied from the statute. The court stressed

that antidumping proceedings are investigative rather than adjudicatory in nature and that an agency need not make available in an investigative proceeding the rights of apprisal, cross-examination, and confrontation that are afforded by a hearing in an adjudicatory proceeding. 12 CIT ___, 689 F. Supp. at 1188-1191.

C. The 1987 Petition For A Changed Circumstances Review

On February 25, 1987, the petitioners commenced a second, somewhat modified request that the Commission carry out a changed circumstances review under 19 U.S.C. § 1675(b)(1) (Supp. V 1987). This petition also was denied by the Commission (Pet. App. 31a-40a). The United States Court of International Trade (Pet. App. 12a-30a) and Court of Appeals for the Federal Circuit (Pet. App. 1a-10a) thereafter affirmed the Commission's determination, thus leading to the present petition for a writ of certiorari (hereinafter *Avesta II*).

Both lower courts in *Avesta II* approved the holding of the Court of International Trade in *Avesta I* that what constitutes a change in circumstances sufficient to warrant a review is a matter that Congress has delegated to the Commission for resolution on a case-by-case or *ad hoc* basis. As had the trial-level court in *Avesta I*, the Court of Appeals for the Federal Circuit in *Avesta II* canvassed the legislative history and discernible congressional intent and concluded that Congress intended that the Commission should continue its longstanding practice of determining each case individually without statutory

guidelines other than that changed circumstances sufficient to warrant a review must be present in the Commission's reasoned judgment. The Court of Appeals for the Federal Circuit saw no basis for the petitioners' position that 19 U.S.C. § 1675(b)(1) should be judicially amended and interpreted to require a review upon the showing of "a reasonable appearance" of changed circumstances. The court observed that its understanding of the broad discretion given by Congress to the Commission over whether a changed circumstances review should be conducted was reinforced by Congress' direction that there be only limited judicial review of the Commission's determinations under sections 516A(a)(1)(B) and (b)(1)(A) of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1516a(a)(1)(B) and (b)(1)(A) (1982 & Supp. V 1987)) (Pet. App. 5a-9a).

Both lower courts in *Avesta II* addressed in detail each of the alleged changed circumstances raised by the petitioners as the grounds for a review and found them inadequate. In adopting the examination and reasoning of the Court of International Trade as its own, the Court of Appeals for the Federal Circuit summarized the alleged changed circumstances as being either the expected and direct result of the imposed import relief, unsupported by the record, or not significantly connected to the impact of dumped Swedish stainless steel plate on the United States domestic industry (Pet. App. 9a).

In particular, the lower courts concluded in agreement with the Commission that any decline in the imports from Sweden was an expected result from the imposition of the antidumping order and had not been shown to be due to the petitioners' acquisition of the plate mill in Indiana; that the petitioners' monopolization

of the Swedish industry producing stainless steel plate left enough capacity to enable the petitioners to dump stainless steel plate in the United States while still satisfying the market in Sweden and other foreign markets; that the petitioners' exports of stainless steel plate to the European Community in fact had not increased as the petitioners represented; that the existence of Voluntary Restraint Agreements by the United States on steel products with a variety of countries apart from Sweden left the petitioners free to continue the exportation of stainless steel plate from Sweden to the United States in whatever quantities they chose and did not mean that the domestic United States industry was any less vulnerable to the impact of dumped imports; and, lastly, that with one insignificant exception, allegedly different and patented types of Swedish stainless steel plate were products "like" those covered by the antidumping order within the antidumping law's meaning and were therefore neither factually nor legally entitled to exclusion from the order on Swedish stainless steel plate (Pet. App. 9a-10a, 18a-30a).

SUMMARY OF THE ARGUMENT WHY THE WRIT SHOULD BE DENIED

The Commission and the courts below have exhaustively considered and rightly rejected in *Avesta I* and *Avesta II* the two issues brought by the petitioners to this Court. Neither issue merits the granting of a writ of certiorari.

The court of appeals correctly construed the legal standard under which the Commission has been

instructed by Congress to operate in deciding whether an antidumping order should be terminated or modified in light of changed circumstances. Consistent with the Antidumping Code of the General Agreement on Tariffs and Trade and with 19 U.S.C. § 1675(b)(1) and its relevant legislative history, the Commission is charged in the first instance to determine in its discretion whether sufficient changed circumstances exist to warrant a review. Congress wisely left this task to the Commission to resolve with its expertise on a case-by-case basis and without any further statutory guidelines. Congress intended that a review be conducted only if it reasonably appears to the Commission that there are changed circumstances sufficient to warrant a review.

With specific regard to the petition for a review of the dumping finding against imports of stainless steel plate from Sweden, the Commission reasonably decided that the petitioners had not demonstrated sufficient changed circumstances to warrant a review. The petitioners' alleged changed circumstances have been scrutinized by the Commission, the trial-level court, and the court of appeals and consistently found to be insufficient to warrant a review. The underlying reasoning of the Commission and courts below is not arbitrary, capricious, or an abuse of discretion. The petitioners have had ample opportunity to be heard on their alleged changed circumstances. An additional review by this Court is unnecessary.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE GOVERNING LEGAL STANDARD ESTABLISHED BY CONGRESS WAS FAITHFULLY APPLIED BY THE INTERNATIONAL TRADE COMMISSION AND PROPERLY AFFIRMED BY THE COURT OF APPEALS IN REJECTING THE PETITIONERS' REQUEST FOR A CHANGED CIRCUMSTANCES REVIEW

The petitioners suggest that 19 U.S.C. § 1675(b)(1) prohibits the Commission from weighing conflicting evidence or reaching a conclusion on "ultimate facts" when determining the threshold question of whether there are sufficient changed circumstances to warrant a review of an antidumping order. According to the petitioners, such activity is reserved for a review itself, including a hearing, if requested, and imposes an excessive standard of persuasion upon petitioners when undertaken by the Commission at the initial stage of a changed circumstances inquiry (Pet. 22). By inference, the petitioners seem to be asserting that the Commission is bound by the statute automatically to accept as sufficient a petitioner's allegations of changed circumstances for the purpose of commencing a review and holding a formal hearing.

In renewing these contentions, the petitioners have misread the congressional intent and are wrongly attempting to create statutory restrictions that Congress deliberately chose not to impose on the Commission. These restrictions effectively would ensure a changed circumstances review whenever sought by a petitioner, contrary to Congress's clear purpose of empowering the Commission with discretion to withhold a review in the

absence of sufficient changed circumstances. As the court of appeals concluded, this will of Congress is manifested both by the language of 19 U.S.C. § 1675(b)(1) and by the legislative background that led to this provision's enactment.

In the Customs Simplification Act of 1954, Pub. L. No. 83-768, § 301, 68 Stat. 1136, 1138 (1954), the United States Tariff Commission was assigned responsibility for conducting injury investigations under the Antidumping Act of 1921. At least by the 1970's, the Commission had begun to entertain requests for review of outstanding antidumping orders to determine whether changed circumstances existed that were sufficient to justify the termination or modification of such orders. *See, e.g.*, Primary Lead Metal from Australia and Canada, Inv. Nos. AA 1921-134A and 135A, USITC Pub. 772 (April 1976); and Northern Bleached Hardwood Kraft Pulp from Canada, Inv. No. AA 1921-105A, USITC Pub. 687 (Sept. 1974).

These earlier reviews were carried out by the Commission without any express statutory authorization such as that contained in 19 U.S.C. § 1675(b)(1). The idea of amending the Antidumping Act of 1921 to have such a provision was broached and rejected in 1974. In the Senate Finance Committee's words,

> The Committee received proposals to *include statutory language regarding* certain concepts and terms, such as . . . *reconsideration of agency determinations and findings,* embodied in the Antidumping Act. These proposals were not accepted for the reason that *the Committee believes the matters involved are adequately treated*

under existing practices and are best left to individual case determinations without additional statutory guidelines.

* * *

(4) *Review of agency determinations and findings.* – The Antidumping Act does not contain specific provisions for the review by each agency of its individual determinations or of the findings of dumping issued by Treasury. *However, both Treasury and the Commission have the authority to review, modify, or revoke their determinations.* The Treasury by regulation has long exercised this function, initially and until 1954, with respect to both less-than-fair-value and injury determinations, and after 1954 with respect to its single determinations of less-than-fair-value imports. *In 1954, the Commission was given the authority to make the injury determinations under the Antidumping Act, and it has continued Treasury's practice as is recently evidenced by its review of several outstanding injury determinations, one of which was an inherent part of an outstanding finding of dumping issued by the Treasury.*

S. Rep. No. 1298, 93d Cong., 2d Sess. 178-179, 181 (1974) (emphasis added).

In 1977, the Commission incorporated the review procedure it had been following in its regulations.

(c) *Institution of investigation.* The Commission *may institute* an investigation for the purposes of § 207.5(a) upon receipt of an application from an interested person, upon its own motion, or upon receipt from the Secretary of the Treasury of appropriate advice concerning an application from an interested person *specifying the changed circumstances forming the basis for review.* . . .

19 C.F.R. § 207.5(c) (1978) (emphasis added).

It was in this posture that Congress found the situation when it repealed the Antidumping Act of 1921 in 1979 and created section 751(b)(1) of the Tariff Act of 1930, as amended, by way of the Trade Agreements Act of 1979, Pub. L. No. 96-39, Title I, § 101, 93 Stat. 144, 175 (1979). The Trade Agreements Act of 1979 approved and implemented, as relevant, the Antidumping Code of 1979 that was agreed to in the Tokyo Round negotiations of the General Agreement on Tariffs and Trade. (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *opened for signature*, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 (entered into force Jan. 1, 1980) (hereinafter "Antidumping Code")). In keeping with this legislation's purpose, 19 U.S.C. § 1675(b)(1) was drafted to execute fully and consistently into United States domestic law Article 9 of the Antidumping Code. *See* Statement of Administrative Action, H.R. Doc. No. 96-153, Part II, 96th Cong., 1st Sess. 392, 429 (1979). Thus, paragraph 2 of Article 9 of the Antidumping Code calls for review of the need for the continued imposition of antidumping duties, *"where warranted,* . . . if any interested party so requests and submits positive information substantiating the need for review." Antidumping Code, 31 U.S.T. at 3933 (emphasis added). Section 1675(b)(1) accordingly instructs the Commission to conduct a review if it receives information "which shows changed circumstances *sufficient to warrant* a review. . . . " (Emphasis added.)

The passage of 19 U.S.C. § 1675(b)(1) was accomplished with congressional awareness and approval of the Commission's case-by-case treatment of changed circumstances petitions and with a harmony between

United States law and the Antidumping Code. In the legislative reports accompanying section 751(b)(1), Congress stated, "The . . . Commission would initiate reviews under this provision *only if* . . . *satisfied* that 'changed circumstances' sufficient to warrant the review exist." S. Rep. No. 249, 96th Cong., 1st Sess. 80 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 72 (1979) (emphasis added). Once section 751(b)(1) had been promulgated, the Commission revised its regulations slightly to mirror the phrase, "changed circumstances sufficient to warrant a review of such determination," found in section 751(b)(1). *See* 19 C.F.R. § 207.45 (1982).

Since 1979, Congress has amended the antidumping and countervailing duty laws via two major pieces of legislation, the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984), and the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988). Although, as is discussed below, Congress did modify section 751(b)(1) in one important respect in 1984, the provision has otherwise stood unchanged since 1979. In particular, the language, "changed circumstances sufficient to warrant a review," has been left untouched. During this time, the Commission has remained steadfast in its adherence to deciding in each instance whether the changed circumstances alleged have been adequate to trigger a review under section 751(b)(1). *See, e.g.*, Birch Three-Ply Door Skins from Japan, Inv. No. 751-TA-6, USITC Pub. 1271 (July 1982); Salmon Gill Fish Netting of Manmade Fibers from Japan, Inv. No. 751-TA-5, USITC Pub. 1234 (March 1982).

This legislative history and the language of 19 U.S.C. § 1675(b)(1) itself make clear that Congress wanted the

Commission to continue the agency's practice of deciding each case for review on its own and to institute a review only when satisfied that changed circumstances sufficient to warrant a review were first demonstrated. The petitioners' claim that the Commission is precluded at this juncture from weighing conflicting evidence and then rendering a determination is directly contradicted by Congress's expressed intent. The petitioners' approach would unjustifiably and illogically circumscribe the Commission's exercise of judgment and guarantee a review when Congress instead conditioned a review upon an initial determination by the Commission that sufficient changed circumstances warrant a review. In reposing this discretion in the Commission, Congress properly implemented the Antidumping Code's provision that a review of the need for continued antidumping duties is to be made "where warranted" if positive information is submitted substantiating the need for review. Antidumping Code, 31 U.S.T. at 4933.

The petitioners are likewise in error in asserting that Congress incorporated a low standard for a changed circumstances review when it amended section 751(b)(1) in the Trade and Tariff Act of 1984. That amendment stipulated that *during an investigation* the party seeking revocation of an antidumping order has the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant *revocation* of the order. The petitioners construe this amendment to mean that Congress "must have intended a lower level of persuasion to apply at the initial stage. To impose a 'burden' of persuading the Commission at the outset that there are

changed circumstances warranting revocation would make the subsequent investigation superfluous." (Pet. 16.)

The court of appeals acknowledged this argument (Pet. App. 6a) and correctly dismissed it, noting that Congress's detailed amendments to section 751(b)(1) in 1984 left untouched the *ad hoc* nature of the Commission's determinations to institute a changed circumstances review (Pet. App. 7a-8a). Congress in 1984 could have modified its standard for a review in any number of ways, such as by predicating a review upon a "reasonable indication" or "reasonable appearance" of changed circumstances, but, as the court of appeals recognized, Congress did not do so (Pet. App. 8a).

The evidence submitted with a request for review may or may not be persuasive on the issue of revocation, *see Matsushita Electric Industrial Co., Ltd. v. United States*, 750 F.2d 927, 932, 3 Fed. Cir. (T) 44 (1984), but a review investigation does not commence on a clean slate. "A foreign manufacturer, after all, is subject to an antidumping order because it was previously found to have engaged in injurious dumping. For that reason, a section 751 review does not begin from an entirely neutral starting point." H. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 182 (1984). In addition, changed circumstances reviews must be conducted on the assumption that dumping will resume if an antidumping order is revoked or cancelled, *see American Permac, Inc. v. United States*, 831 F.2d 269, 274 (Fed. Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988). This assumption of dumping is particularly justified in the petitioners' circumstances, because the last administrative review by the United States Department of Commerce of the antidumping order against stainless steel

plate from Sweden revealed continued dumping. 49 Fed. Reg. 39,885-86 (Oct. 11, 1984). More recently, the Department of Commerce determined not to revoke this antidumping finding. 55 Fed. Reg. 36,680-81 (Sept. 6, 1990).

In summary, the 1984 amendment to section 751(b)(1) did not disturb the Commission's discretion to determine on an *ad hoc* basis whether there are sufficient changed circumstances to warrant a review, but simply directed statutorily that throughout a changed circumstances investigation, from the filing of a petition forward, the burden of persuasion falls upon the petitioners. While this burden at the initial stage does not demand that the party desiring a review establish that the crucial factors underlying the original determination of injury no longer hold true, *see Avesta AB v. United States*, 12 CIT ___, 689 F. Supp. at 1181 ("since the application of such a burden would eliminate the need for a review investigation once the decision to undertake one has been made"), the evidence that favors a party seeking revocation must be sufficiently strong in the Commission's judgment to warrant a review. The petitioners simply have failed to muster sufficiently convincing evidence.

II. THE DETERMINATION AGAINST REVIEW OF THE SWEDISH PLATE DUMPING FINDING IS JUSTIFIED ON THE MERITS, SO THAT A WRIT OF CERTIORARI IS UNCALLED FOR AND INAPPROPRIATE

The petitioners claim in general terms that the Commission acted arbitrarily and capriciously by not initiating a review of the Swedish plate dumping finding.

According to the petitioners, their alleged changed circumstances were "obviously sufficient" to require a review and "on their face" showed dramatic changes in the petitioners' import behavior. The petitioners argue broadly that the determination against a changed circumstances review "lacks a rational basis in fact . . . " (Pet. 25).

These assertions by the petitioners are groundless and amount to a request that this Court analyze again the evidentiary record compiled in *Avesta II* that has already been examined by the Commission, the trial-level court, and the court of appeals. To the extent that the arguments raised by the petitioners in *Avesta II* were also raised in *Avesta I*, the common facts involved have been studied on five occasions in slightly more than five years. In every instance, the alleged changed circumstances have been found insufficient to warrant a review only after a thorough evaluation of the evidence. Each of the successive determinations, including that of the court of appeals, has articulated in a reasoned and reasonable fashion the rationales for concluding that the alleged changed circumstances were insufficient to warrant a review.

A writ of certiorari ordinarily will not be granted for the purpose of reviewing evidence and discussing specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). No cause exists to depart from this practice in this case, especially given that the court of appeals concurred with the trial-level court in supporting the findings of fact made by the Commission. Notably lacking in the petition is any attempt by the petitioners to identify precisely why and how the various subsidiary findings of the Commission and the courts below could constitute an

abuse of discretion. If the petitioners could point to egregious errors, any such errors should have been documented exactly in the petition.

In fact, contrary to the petition, the point-by-point treatment in the courts and agency below of the petitioners' alleged changed circumstances reasonably substantiates the determination that there was inadequate positive evidence to initiate a review. Having been able to submit to the Commission whatever views and evidence they wished in their petitions for a changed circumstances review, the petitioners have only themselves to blame for any deficiencies in the sufficiency of their presentations.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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No. 90-971

In the Supreme Court of the United States

OCTOBER TERM, 1990

AVESTA AB, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States International Trade Commission erred in rejecting petitioners' request to review an antidumping order under Section 751(b)(1) of the Tariff Act of 1930, 19 U.S.C. 1675(b)(1).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	11

TABLE OF AUTHORITIES

Cases:

A. Hirsh, Inc. v. *United States*, 737 F. Supp. 1186 (Ct. Int'l Trade 1990)	3, 9
Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	10
Mobil Oil Corp. v. *FPC*, 417 U.S. 283 (1974)	11
United States v. *Lovasco*, 431 U.S. 783 (1977)	10
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	11

Treaty, statutes, and regulations:

General Agreement on Tariffs and Trade, *opened for signature* Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 (entered into force Jan. 1, 1980)	9-10
Art. 9, 31 U.S.T. 4933	10
Tariff Act of 1930, 19 U.S.C. 1202 *et seq.*:	
Tit. IV, 19 U.S.C. 1490 *et seq.*:	
§ 516A(b)(1)(A), 19 U.S.C. 1516(b)(1)(A)	4, 11
Tit. VII, 19 U.S.C. 1671 *et seq.*	2
§ 731, 19 U.S.C. 1673	2
§ 735, 19 U.S.C. 1673d	2
§ 751(a), 19 U.S.C. 1675(a)	2

Statutes and regulations—Continued: Page

§ 751(b), 19 U.S.C. 1675(b) 7, 9
§ 751(b)(1), 19 U.S.C. 1675(b)(1) 2, 3, 5, 7, 8
§ 751(c), 19 U.S.C. 1675(c) 3
19 U.S.C. 2504(a) 10
19 C.F.R.:
Section 207.45(a) 2, 9, 10
Section 207.45(b) 2
Section 353.25 2

Miscellaneous:

H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. (1984) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 914 F.2d 232. The opinion of the Court of International Trade (Pet. App. 12a-30a) is reported at 689 F. Supp. 1173.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1990. The petition for a writ of certiorari was filed on December 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Tariff Act of 1930, 19 U.S.C. 1671 *et seq.*, the United States must impose antidumping duties[1] on imports when the Department of Commerce "determines that a class or kind of merchandise is being, or is likely to be, sold in the United States at less than its fair value," and the United States International Trade Commission (Commission) "determines that * * * an industry in the United States * * * is being materially injured * * * by reason of imports of that merchandise." 19 U.S.C. 1673; see 19 U.S.C. 1673d. Such duties, however, are not irrevocable. Under Section 751(a) of the Act, 19 U.S.C. 1675(a), the Department of Commerce periodically reviews whether there have been sales at less than fair market value and may revoke an antidumping order after determining that such sales have not occurred within the last three years. See 19 C.F.R. 353.25.

Moreover, under Section 751(b)(1) of the Act, 19 U.S.C. 1675(b)(1),

> [w]henever the * * * Commission receives information concerning, or a request for review of, * * * an affirmative [injury] determination made under section * * * 1673d(b) * * * of this title, *which shows changed circumstances sufficient to warrant a review of such determination*, it shall conduct such a review after publishing notice of the review in the Federal Register. [Emphasis added.]

In connection with such requests, the Commission solicits comments from interested parties. See 19 C.F.R. 207.45(b). Under the Commission's regulations, asserted changed circumstances—in order to trigger further review—must sug-

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[1] As petitioners note, "[d]umping is defined as price discrimination between international markets." Pet. 2 n.2.

gest that revocation of the antidumping order would not lead to a recurrence of material injury to the domestic injury. 19 C.F.R. 207.45(a). Moreover, such asserted changes may not include those changes that are the natural and direct consequence of imposition of the challenged antidumping order. See, *e.g.*, *A. Hirsh, Inc.* v. *United States*, 737 F. Supp. 1186, 1188 (Ct. Int'l Trade 1990). After an investigation, the Act authorizes the Commission to "revoke, in whole or in part, * * * an antidumping order." 19 U.S.C. 1675(c).

2. In 1973, the United States Tariff Commission (the Commission's predecessor) determined after an investigation that "an industry in the United States is being injured by reason of the importation of stainless-steel plate from Sweden being sold at less than fair value." Pet. App. 44a. Petitioners, the Swedish producer and United States importer of that product, objected to the Commission's determination and resulting antidumping order issued under 19 U.S.C. 1673d. Pet. App. 43a-48a.

In 1985, petitioners filed with the Commission a request to review that antidumping order under Section 751(b)(1) of the Act, 19 U.S.C. 1675(b)(1). Petitioners claimed the following four "changed circumstances" warranted the Commission's review of the previously adopted antidumping order: (1) petitioner's purchase of a production plant in the United States; (2) the minimal amount of imported stainless steel plate from Sweden; (3) the restructuring of the Swedish stainless steel plate industry; and (4) the increased Swedish trade with the European Community. *Avesta AB* v. *United States*, 689 F. Supp. 1173, 1176-1177, 1181-1187 (Ct. Int'l Trade 1988). The Commission denied the request, ruling that petitioners "did not show changed circumstances sufficient to warrant a review of the 1973 injury determination regarding stainless steel plate from Sweden." *Id.* at 1177.

Petitioners then sought review of the Commission's determination before the Court of International Trade. In 1988, the Court of International Trade upheld the Commission's decision, concluding that the Commission's

> dismissal of [petitioners'] request for review and modification or revocation of a 12-year old finding of dumping against stainless steel plate from Sweden was reasonable and not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *."

Avesta AB v. *United States*, 689 F. Supp. at 1191 (quoting 19 U.S.C. 1516a(b)(1)(A)). The court first agreed with the Commission that petitioners "failed to show how the 1976 acquisition [of a production plant in the United States] has affected the quantity of Swedish steel imports." 689 F. Supp. at 1182. Consequently, the court held that the Commission's "conclusion that the 1976 acquisition did not constitute a changed circumstance sufficient to warrant review was reasonable and had a rational basis in fact." *Id.* at 1183. The court next upheld the Commission's determination that the asserted decline in Swedish imports was "simply an anticipated result of the issuance of the antidumping order," *id.* at 1184, and agreed that the restructuring of the Swedish stainless steel industry would not inevitably "lead to a decline in exports," *id.* at 1185. Finally, the court concluded petitioners had "failed to show the [Commission] that the Trade Agreement [between Sweden and the European Community] led to significant changes in Swedish exports to the EC and thereby affected the volume of imports of hot-rolled stainless steel plate into the United States." *Id.* at 1187.[2]

3. In February 1987, while petitioners' action was pending before the Court of International Trade, petitioners

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[2] Petitioners sought no further review of the court's judgment.

filed with the Commission a second request to review the antidumping order under Section 751(b)(1) of the Act, 19 U.S.C. 1675(b)(1). Pet. App. 34a. Apart from renewing the "changed circumstances" arguments previously rejected by the Commission, petitioners alleged that

> U.S. producers are highly protected due to the negotiation and implementation of "voluntary restraint agreements" (VRAs) with those countries whose producers are the major foreign supplier to the United States market.

Id. at 35a.[3] Petitioners also claimed that "Sweden supplies U.S. demand for cold-rolled plate of widths which U.S. firms are unable to supply," and that "[s]everal patented types of stainless steel plate that did not exist in the 1970s and that are not produced in the U.S. are being exported from Sweden to the U.S." *Ibid.*

In June 1987, the Commission denied petitioners' renewed request, concluding that petitioners have not shown "changed circumstances sufficient to warrant institution of a review investigation." Pet. App. 39a. The Commission reiterated that "petitioners have offered no legally sufficient reason why the current levels of plate imports are the result of anything other than import relief." *Id.* at 36a. In that regard, the Commission also found that "the level of imports from Sweden has not decreased since [petitioners'] purchase [of a production plant in this country]." *Id.* at 37a. Similarly, the Commission determined that petitioners failed "to support their assertion that exporters have significantly altered their long-term practices with regard to exports of plate to the United States." *Ibid.*

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[3] Petitioners noted that "Sweden has not entered into a VRA with the U.S. and its exports to the U.S. remain subject to antidumping and countervailing duties." Pet. App. 35a.

Turning to petitioners' claim that they were exporting "specialty types of stainless steel plate that are not produced in the United States," Pet. App. 37a, the Commission stated that

> [s]imply because a new composition or size is produced—and even patented—does not make it sufficiently different in its characteristics and uses from other types of stainless steel plate to warrant a finding that there is no domestic like product.

Id. at 37a-38a. With respect to petitioners' reliance on the existence of VRAs, the Commission found the following "flaws": first, "because there is no VRA in effect with Sweden, the Swedish producer may continue to export to the United States in whatever quantities it chooses," *id.* at 38a; and second, "the existence of VRAs does not mean that the U.S. stainless steel industry is any less vulnerable to the impact of dumped imports," *ibid.*[4]

4. In October 1989, the Court of International Trade again held that

> the Commission's determination regarding [petitioners' request] for review of the 1973 finding of dumping of stainless steel plate from Sweden was not arbitrary, capricious or an abuse of discretion and was in accordance with law.

Pet. App. 30a. The court reviewed each of the "changed circumstances" asserted by petitioners and concluded that the record fully supports the Commission's determination that none—either considered separately or in combination—called for a review of the antidumping order under

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[4] The Commission again rejected petitioners' assertion that "the European market is a growing market for its plate exports," Pet. App. 38a, and that "a restructuring of the Swedish stainless steel industry" called for further review of the underlying antidumping order, *id.* at 39a.

Section 751(b)(1) of the Act, 19 U.S.C. 1675(b)(1). Pet. App. 18a-30a.[5]

5. In September 1990, the court of appeals affirmed. Pet. App. 1a-10a. In the court of appeals, petitioners contended that "'*a reasonable appearance*' of changes in circumstances should be the rule of decision regarding the sufficiency of alleged changes to warrant a review [under Section 751(b)(1)]." Pet. App. 5a. The court acknowledged "that the critical language in section 751(b) contains less than exacting standards of decision." *Id.* at 6a. After "canvassing the legislative history and discernable [*sic*] congressional intent," however, the court determined that "Congress's knowing choice of the 'sufficient to warrant review' language in section 751(b) manifests its intent that the review process continue to proceed on a case-by-case basis." *Id.* at 6a-7a. The court therefore concluded that the Commission's

> finding that [petitioners] had not established changed circumstances sufficient to warrant review was, in fact, an exercise of discretion predicated upon judgment anchored in the language and spirit of the relevant statutes and regulations. As such, its conclusion was in no sense an error of law.

Id. at 8a-9a (internal quotation marks and citation omitted). Accordingly, the court rejected petitioners' proposed legal standard, holding that "Congress delegated the decision as to what constitutes a change in circumstances sufficient to warrant a review investigation to the discretion of the [Commission] on a case-by-case basis." *Id.* at 6a.

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[5] In so concluding, the court found that the Commission "examined the relevant data and articulate[d] a satisfactory explanation for its action." Pet. App. 18a.

Petitioners also contended that they had shown sufficient changed circumstances to warrant a review investigation, and thus the Commission's decision was arbitrary and capricious. The court concluded, "after independently assessing the record and arguments before it," that the Commission's "determination that [petitioners] had not demonstrated changes sufficient to warrant review was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Pet. App. 9a. In closing, the court of appeals stated that "[f]urther elaboration, in light of the trial court's thorough and well reasoned examination of this issue, * * * would only add needless redundancy." *Id.* at 9a-10a (citation omitted).

ARGUMENT

1. Petitioners principally contend that Congress, in enacting Section 751(b)(1) of the Act, 19 U.S.C. 1675(b)(1), "intended that only a low threshold showing would be sufficient to obtain review [of an antidumping order]." Pet. 14; see *id.* at 11-22. Under that statute, the Commission must initiate review of an antidumping order when the requesting party presents "information * * * which shows changed circumstances sufficient to warrant a review of such [an order]." 19 U.S.C. 1675(b)(1). The particular statutory language, as the court of appeals recognized, "contains less than exacting standards of decision." Pet. App. 6a. Accordingly, Congress has delegated to the United States International Trade Commission the task of implementing its charged responsibility to oversee and modify antidumping duties imposed under the Tariff Act.

In discharging that mandate, the Commission has properly refrained from implementing petitioners' suggested "low threshold" standard (Pet. 14, 16), particularly where, as here, "Congress carefully limited the availability of § 1675(b)

investigations," *Avesta AB* v. *United States*, 689 F. Supp. at 1180. As Congress has noted, a change such as a decline in imports, rising prices, or improved performance by the domestic industry does not warrant a review investigation because "the existence of an antidumping order is a discipline on the pricing practices of foreign manufacturers [and] * * * the order offsets the effects of dumping." H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 182-183 (1984). The Commission has therefore determined that asserted changed circumstances—in order to ground further review—must suggest that revocation of the antidumping order would not lead to a recurrence of material injury to the domestic industry. 19 C.F.R. 207.45(a). Moreover, such asserted changes may not include those changes that are the natural and direct consequence of imposition of the challenged antidumping order. See, *e.g.*, *A. Hirsh, Inc.* v. *United States*, 737 F. Supp. 1186, 1188 (Ct. Int'l Trade 1990). Accordingly, as both the Federal Circuit and the Court of International Trade have held, the Commission's implementation of the statutory standard is consistent with Congress's directive and is otherwise unexceptionable. See, *e.g.*, Pet. App. 6a-9a; *id.* at 17a-18a; *A. Hirsch, Inc.* v. *United States*, 737 F. Supp. at 1188; *Avesta AB* v. *United States*, 689 F. Supp. at 1178-1181.[6]

2. Petitioners also assert (Pet. 11-12, 14) that the Commission's implementation of Section 751(b) conflicts with the federal government's obligations under the Antidumping Code of the General Agreement on Tariffs and Trade. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT Code), *opened for signature* Apr. 12, 1979, 31 U.S.T. 4919,

[6] Indeed, as the court of appeals pointed out, Congress revised Section 751 in 1984 but "left untouched the *ad hoc* nature of [Commission] decisions to institute review." Pet. App. 7a; see Resp. Br. in Opp. 10-17.

T.I.A.S. No. 9650 (entered into force Jan. 1, 1980). Petitioners did not raise this issue in the courts below, and they have therefore not preserved it for review. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, this belated point is meritless. First, any such conflict would be immaterial. In the Trade Agreements Act of 1979, Congress has expressly stated that "no provision of any trade agreement [including the GATT Code] * * * which is in conflict with any statute of the United States shall be given effect under the laws of the United States." 19 U.S.C. 2504(a). Second, the Commission's standard is in fact consistent with the GATT Code's requirement that an antidumping order remain in effect "to the extent necessary to counteract dumping which is causing injury." GATT Code, art. 9, ¶ 1, 31 U.S.T. at 4933. Under the Commission's standard, sufficient changed circumstances must suggest that revocation of the antidumping order would not lead to a recurrence of material injury to the domestic injury. 19 C.F.R. 207.45(a).

3. Finally, petitioners contend that the court of appeals, in rejecting their challenge to the Commission's decision, "failed to conduct any meaningful review of [that] decision." Pet. 23; see *id.* at 23-25. That contention is off the mark. The court of appeals explicitly concluded, "after independently assessing the record and arguments before it," that the Commission's "determination that [petitioners] had not demonstrated changes sufficient to warrant review was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Pet. App. 9a. Moreover, the court of appeals took note of the "trial court's thorough and well-reasoned examination of this issue," *ibid.*, and therefore "adopt[ed] the examination and reasoning of that opinion as its own," *id.* at 10a; see *id.* at 18a-30a (opinion of the Court of International Trade).

In any event, this Court has long held that the responsibility for assessing a record to determine whether an agency's decision is reasonable lies primarily in the lower courts. See, *e.g.*, *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). That prudential principle applies a fortiori to instances where, as here, both the trial court and the court of appeals concur in sustaining the agency's decision under the more deferential arbitrary and capricious standard. See 19 U.S.C. 1516(b)(1)(A). On the record presented, petitioners have offered no sound basis for this Court to depart from its practice of declining to review the concurrent assessments of an administrative record by two lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Petitioners,

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THE UNITED STATES, ALLEGHENY LUDLUM STEEL CORPORATION, ARMCO INC., JESSOP STEEL CORPORATION, J & L SPECIALTY PRODUCTS COMPANY, WASHINGTON STEEL CORPORATION, AND UNITED STEELWORKERS OF AMERICA, AFL/CIO-CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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TABLE OF AUTHORITIES

Cases: ***Page***

American Permac, Inc. v. United States, 831 F.2d 269 (Fed. Cir. 1987), *cert. dism'd*, 485 U.S. 901 (1988) 4

A. Hirsh, Inc. v. United States, 737 F. Supp. 1186 (CIT 1988) 5

Statute:

Tariff Act of 1930, 19 U.S.C. §§ 1202 *et seq.*:

19 U.S.C. § 1675(b)(1) . . . . . *passim*

Administrative Decisions:

Birch Three-Ply Door Skins From Japan, USITC Publ. 1271, Inv. No. 751-TA-6 (July 1982) 2

Electric Golf Carts From Poland, USITC Publ. 1069, Inv. No. AA1921-147A (June 1980) 2

Salmon Gill Fish Netting of Manmade Fibers from Japan, USITC Publ. 1921, Inv. No. 751-TA-11 (December 1986) 4

Television Receiving Sets From Japan, USITC Publ.1153, Inv. No. 751-TA-2 (June 1981) 2

Miscellaneous Authorities:

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, April 12, 1979, T.I.A.S. No. 9650, 31 U.S.T. 4919 . . . . . *passim*

19 C.F.R. § 353.25(d)(4) 3

49 Fed. Reg. 39885 (1984) 3

55 Fed. Reg. 36681 (1990) 3

In the Supreme Court of the United States

October Term, 1990

No. 90-971

AVESTA AB AND AVESTA STAINLESS, INC.,

Petitioners,

v.

THE UNITED STATES, ALLEGHENY LUDLUM STEEL CORPORATION, ARMCO INC., JESSOP STEEL CORPORATION, J & L SPECIALTY PRODUCTS COMPANY, WASHINGTON STEEL CORPORATION, AND UNITED STEELWORKERS OF AMERICA, AFL/CIO-CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

The petition for certiorari asserts that the Commission's construction of Section 751(b)(1) is contrary to its plain meaning and legislative history, including the GATT Anti-dumping Code. Section 751(b)(1) was enacted to implement the GATT Code, and Congress and the Administration made this intent crystal clear. Pet.

12-13. The government's brief attempts to disguise this obvious conclusion in two respects. U.S. Br. in Opp. 9-10.

First, contrary to the government's suggestion, petitioners do not contend that Section 751(b)(1) is inconsistent with the Anti-dumping Code. U.S. Br. in Opp. 10. Rather, petitioners recognize that Congress expressly intended to implement the Code by enacting Section 751(b)(1) and that the Commission's decisions have acknowledged that Section 751(b)(1) was enacted to implement the GATT Anti-dumping Code. In fact, the Commission has recognized that the GATT Code is relevant to proper construction of Section 751(b)(1).[1] However, it is petitioners' position that the Commission has failed to apply Section 751(b)(1) in a manner consistent with the statute's text and legislative history. (Incidentally, respondents Allegheny Ludlum *et al.* incorrectly suggest that Congress enacted Section 751(b)(1) to merely codify the Commission's prior review practices. Allegheny Br. in Opp. 13-14. This is demonstrably wrong and the Commission itself has recognized that the legislative history of the Act refers to its prior practice "only by way of comment and without specifically approving it or indicating that the new law would be a codification of that practice." *Electric Golf Carts From Poland*, USITC Publ. 1069, Inv. No. AA1921-147A (June 1980) 12-13 (footnote omitted).)

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[1] The Commission expressly acknowledged that Section 751(b)(1) was "intended to implement" the GATT Anti-dumping Code and that "an examination of the relevant parts of these two agreements [including the prior Antidumping Agreement] helps to clarify the Commission's role." *Electric Golf Carts From Poland*, USITC Publ. 1069, Inv. No. AA1921-147A (June 1980) 12; *accord*, *Birch Three-Ply Door Skins From Japan*, USITC Publ. 1271, Inv. No. 751-TA-6 (July 1982) 3; *Television Receiving Sets From Japan*, USITC Publ. 1153, Inv. No. 751-TA-2 (June 1981) 6 and 28.

The government's second error is to claim that petitioners present a "new" issue not properly before the Court. U.S. Br. in Opp. 9-10. The issue in this case has always been the proper construction of Section 751(b)(1). In fact, petitioners expressly relied upon the Anti-dumping Code in both courts below in support of its construction of Section 751(b)(1). Br. for Avesta AB 24-25 (Fed. Cir. No. 90-1120); Br. in Spt. of Avesta AB's Mot. for Judg. Upon Agency Record 19-21 (CIT No. 87-07-00799).

Apart from the government's erroneous assertions, the domestic industry makes grossly misleading and incomplete arguments. First, the industry asserts that "the last administrative review by the ... Department of Commerce ... revealed continued dumping...," citing 49 Fed. Reg. 39885-39886 (Oct. 11, 1984). Allegheny Br. in Opp. 16-17. The most recent review of the Swedish steel dumping margins covered a period from 1973 to May 1982, almost a decade ago. 49 Fed. Reg. 39885-39886 (1984). Even then, the dumping margin was zero for one review period and only 4.46% or 6.21% for others. *Ibid.*

Second, the same respondents assert outrageously that the Department of Commerce "determined not to revoke this antidumping finding" as recently as September 6, 1990. Allegheny Br. in Opp. 17. This statement is grossly misleading. Under its regulations, 19 C.F.R. § 353.25(d)(4), the Department of Commerce publishes a notice announcing that it *intends to revoke* any antidumping finding in which there has been no request for a review of the dumping margins in four consecutive years. This procedure was followed here. 55 Fed. Reg. 22365 (June 1, 1990). All that is required to prevent revocation is for a single interested party to file a *pro forma* objection, without advancing any reasons. In this case, a single, simple "objection" was filed by the industry respondents. Solely on this basis, the Department of Commerce could not revoke

the dumping finding. This hardly rises to the dignity of a "determination," as respondents Allegheny Ludlum *et al.* assert. It is plainly apparent from its published notice, 55 Fed. Reg. 36681 (Sept. 6, 1991), that the Department of Commerce made no substantive determination that sales at less than fair value have in fact continued (or resumed for the companies which made no importations) since the last actual review period, which ended in May 1982.

Third, the domestic industry asserts that, in conducting a review under Section 751(b)(1), the Commission must assume that dumping will continue if an antidumping order is revoked or cancelled, invoking *American Permac, Inc. v. United States*, 831 F.2d 269, 274 (Fed. Cir. 1987), *cert. dism'd*, 485 U.S. 901 (1988). Allegheny Br. in Opp. 16. In *American Permac* the Commission had in fact *granted* review. Thus, in contrast to the situation in this case, the Commission made its decision on the basis of the facts presented on a full administrative record. That is precisely what did *not* occur in this case because the Commission refused to initiate a review under Section 751(b)(1).[2]

Finally, mention must be made of respondent United States' allusion to a Commission regulation which in essence requires a

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[2] The Commission's confusion of the threshold showing sufficient to *initiate* a review with that required to obtain revocation is apparent from comparing its denial of the petitioners' request *to initiate* a review with its *third* decision in *Salmon Gill Fish Netting of Manmade Fibers from Japan*, USITC Publ. 1921, Inv. No. 751-TA-11 (December 1986), which revoked the dumping order. The private respondents fail to cite this decision. Allegheny Br. in Opp. 14. The Commission's decision denying petitioners' *request* for review is indistinguishable in terms of analysis and burden from its last decision *on the merits* in *Salmon Gill Fish Netting, supra*, which should not be the case under Section 751(b)(1); that decision was made after a hearing and full investigation.

showing that "revocation of the antidumping order would not lead to a recurrence of material injury." Br. for U.S. in Opp. 9. It also asserts that the Commission may not consider changed circumstances "that are the natural and direct consequences of imposition of the challenged antidumping order ...," citing *A. Hirsh, Inc. v. United States*, 737 F. Supp. 1186, 1188 (CIT 1988). *Ibid.* But these points lead to a "Catch-22" rationalization intended to justify the Commission's practice of preventing meaningful review of outstanding dumping orders.

The burden of proving that revocation of an antidumping order would not cause a recurrence of material injury must come during an investigation. It must not be a prerequisite for commencing the investigation. Here, petitioners obviously made a sufficient showing of "changed circumstances" to require the Commission to initiate a review and give petitioners an opportunity to show *on the record* that no domestic industry would be injured if the order were modified or revoked.

The Commission should have conducted an investigation to determine whether the almost 20-year-old order in issue remains necessary. Congress' intent in enacting Section 751(b)(1) was to permit the restoration of trade and review by this Court is necessary to prevent antidumping orders from becoming permanent barriers to trade.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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